THE MEDIEVAL MEDITERRANEAN * BRILL

Admiralty and Maritime Laws in the Mediterranean Sea (ca. 800-1050)

The *Kitāb Akriyat al-Sufun* vis-à-vis the *Nomos Rhodion Nautikos*

Hassan S. Khalilieh

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BY

HASSAN S. KHALILIEH

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PRINTED IN THE NETHERLANDS

To the memory of

ʿAbd Al-Raḥmān Abū Zayd Ibn Muḥammad Ibn Khaldūn

Anthropologist, statesman, jurist, historian, scholar, and humanist

Ramaḍān 1st, 732 to Ramaḍān 26th, 808 A.H.
May 26th, 1332 to March 17th, 1406 C.E.

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PREFACE

It is a truism that the formulation of international law arises from the confrontation of alien cultures and their struggle to forge common principles with which to govern interactions between their peoples. In cases where one culture subjugates another and institutes its legal system in place of its predecessor's, some degree of assimilation of the legal practices and customs of the subjugated culture inevitably occurs and establishes its contribution to the ongoing development of the jurisprudence of the region over which it ruled. Nowhere is this process more apparent than in the Mediterranean world, which has seen, throughout its history, domination by one civilization after another. Certain eras of that history have received little or no attention by legal historians, however, due to the paucity of documentation recording their legal practices.

The purpose of this study is to begin to fill in such a gap, specifically, the evolution of admiralty and maritime law in the Mediterranean region from the seventh through the first half of the eleventh century. Its scope, therefore, is more concentrated, both in the time and geographical region covered, than its companion volume, *Islamic Maritime Law: An Introduction* (Leiden: E.J. Brill, 1998), though there is unavoidably some overlap in their subject matters. This study introduces readers to the manner in which Muslim jurists viewed and resolved maritime disputes, in comparison to their Roman and Byzantine predecessors. Consequently, it addresses primarily commercial dealings.

On the eve of the Islamic military expansions of the seventh and eighth centuries, it was in the main the church, the state, wealthy merchants and private entrepreneurs who controlled shipping in the Mediterranean. Rules governing shipping were thus laid down by experienced local mariners, ecclesiastical institutions, and/or imperial lawyers; the last group compiled the Corpus Juris Civilis promulgated by Justinian I (527–565), and the Nomos Rhodion Nautikos (Rhodian Sea Law), codified between 600 and 800. The latter was recognized in Byzantine provinces on the eastern coasts of the Mediterranean, Aegean, Marmora, and Black seas from the eighth through the tenth centuries, during which time Islamic prominence

was discernible in the Mediterranean and Aegean. In the reign of Leo the Wise (886–912), the Rhodian Sea Law appeared as an appendix in the first editions of the Basilika. This legal evidence from the Byzantine world enables scholars today to trace the evolution of maritime practices in the Byzantine Mediterranean from the sixth until the early eleventh centuries.

By contrast, with only scant and sporadic data derived from documentary evidence and late eighth century C.E. Islamic jurisprudence, to do likewise regarding the development of Islamic maritime laws in the Mediterranean has been difficult. As a result, it has generally been assumed that, with the exception of religious and personal status laws, Muslim legal authorities maintained the judicial system and practices of the former Byzantine territories as long as they did not contradict Islamic sacred law and Prophetic traditions. However, the discovery of the Islamic legal treatise Kitāb Akriyat al-Sufun wal-Nizāʿ bayna Ahlihā (*Treatise concerning the Leasing of Ships and the Claims between (Contracting) Parties*), a copy of which was first discovered more than two decades ago, has shed considerable light on the subject. Attributed to the Mālikī jurist, Muḥammad Ibn ʿUmar (d. 310/923), it is at present considered the oldest and most comprehensive collection of Islamic maritime commercial law in effect between the eighth and tenth centuries. It contains nine chapters and six jurisprudential queries of Mālikī jurists and was compiled sometime between the late ninth century and the second decade of the tenth. Its promulgation coincided with the Islamic *imperium* over the Mediterranean Sea and the capture of Sicily and Crete—two strategic islands and ports of call between East and West, the Muslim and Christian worlds. Its discovery clarifies unsolved issues pertaining to the evolution of maritime legal history in the Mediterranean Sea between 800 to 1050—a period in maritime legal history whose gaps contemporary scholars have not attempted to bridge. It further illuminates the extent to which Muslim jurists maintained and incorporated articles (codes) from the Rhodian Sea Law and the Digest into their own digests. Moreover, it sheds light on the precedents the *fuqahāʾ* introduced into shipping laws, and their contribution to internationalizing sea law in the Mediterranean. Thus, the discovery of the Kitāb Akriyat al-Sufun enables a comparison, the subject of this study, between it and the Nomos Rhodion Nautikos that clarifies the extent to which Muslim jurists maintained Byzantine maritime customs in former Byzantine territories and incorporated specific arti-

cles of the Nomos Rhodion Nautikos and the Digest into their rulings. It thus makes it possible to begin to understand and evaluate the contribution of Islamic law to the evolution of Mediterranean jurisprudence.

This study consists of seven chapters and two appendices. Chapter one deals with the physical and legal significance of the ship, with an emphasis on the methods employed to compute the ship capacity and the importance of naming commercial vessels. Chapter two examines issues of ownership and possession of a vessel, the employment of crew—their duties, rights and payment conditions—and the legal status of passengers on board ship. Carriage of cargo by sea and forms of contracts, liability of the lessor, shipping fees and the factors affecting them, and the circumstances in which the contract may be breached are covered in chapter three. Jettison, general average, and contribution are treated in chapter four. Chapter five describes Byzantine and Islamic laws of collision followed by the rules governing the salvage of jetsam, which are surveyed in chapter six. The final chapter explains the legal differences between Byzantine and Islamic mercantile law and outlines the principles of the sea loan, *chreokoinōnia*, and *qirāḍ*.

This book owes its inception to Dumbarton Oaks Research Library, Washington D.C. (Harvard University), which granted me generous financial support and afforded me an opportunity to work under truly favorable conditions while a Fellow in Byzantine studies during 2000–2001. I am personally indebted to Prof. Alice-Mary Talbot, Director of Byzantine Studies, to whom I owe many heartfelt thanks, as well as to the Senior Fellows Prof. George Dennis, Prof. John Duffy, Prof. Ioli Kalavrezou, Prof. Angeliki E. Laiou, Prof. Jean-Michel Spieser, and Prof. Robert Taft. I want to acknowledge my deep gratitude to Prof. Abraham L. Udovitch for persuading me to investigate and develop this topic, to Prof. Mark R. Cohen and Prof. William Jordan, teachers and sincere friends, and to Mr. Krikor Chobinian, who devoted a great deal of his precious time to the search for bibliographical references. It is my pleasure to convey my warmest thanks to Prof. John H. Paryor, Prof. John F. Haldon, Prof. Vassilios Christides, and Prof. George L. Delgado whose invaluable observations and reservations on my manuscript have shaped and consolidated it. Further, I want to thank Prof. David Abulafia, Cambridge University, Prof. Majid al-Haj and Prof. Yossi Ben-Artzi, University of Haifa, for their support, as well as Prof. Robert Force

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GLOSSARY OF NON-ENGLISH TERMS

Abbreviations

A.H. After the *Hijra*, migration of the Prophet from Makkah to Medīna; the year it occurred, 622 C.E., is the base-year of the Muslim era.

A. S. *Kītāb Akriyat al-Sufun wal-Nizāʿ bayna Ahlihā*.

C.E. Common or Christian Era.

CJ. Codex Justinianus

CTh. Codex Theodosianus.

Ibid. Ibidem, "in the same place," refers to a single work cited in the note immediately preceding.

i.e. id est, that is.

N. N. Nomos Rhodion Nautikos.

Op. cit. Opere citato, "in the work cited."

r. recto, the front side of a leaf, letter, or manuscript.

v. verso, the back side of a leaf, letter, or manuscript.

q.v. quod vide, see.

Terms

Actio utilis or *actio in factum* is an action given originally by the *praetor* (*q.v.*) on the alleged facts of the case alone, where no standard civil law action was directly applicable.

Agoranomos ("eparch" or "prefect"). Literally means "market inspector." During the age of the Roman Empire, the *agoranomos* came to mean "*aedile*." The *aedile* was to decide law cases that did not come under anyone else's jurisdiction, to inspect public buildings and temples and to see to it that there were sufficient provisions available in the city markets. The *aedile* was in charge of roads, aqueducts, drains, walls, city streets, sanitation, and the public peace. By the end of the third century, the *agoranomos* in the sense of *aedile* had been replaced by the "eparch" or "prefect," which came to signify "market inspector" who was in charge of land

registration, registration of manumission of slaves, drawing up contracts and bills of sale, and the preservation of legal documents; for all these services a tax was levied called the "*agoranomeion*."

Aḥkām (sing. *ḥukm*) Legal consequences of the facts of cases.

Ahl al-maʿrifa. People of knowledge, *i.e.*, experts in the maritime affairs and industry.

Ahl al-ʿUdūl. Honorable/trustworthy witnesses.

Ajīr khāṣṣ. A private carrier, or a servant exclusively at the service of one person; one who is hired by a contract of employment for a specific period of time or work for a fixed pay, provided that he does not commit any action which is defined as being transgression or negligence.

Ajīr mushtarak. A common carrier; a person with whom a contract is made for a specific task such as transporting a thing to a specified destination.

Akatos. A kind of merchant oared galley, using thirty to fifty rowers, for use on rivers as well as open water.

Amān. A temporary safe conduct given to an enemy alien merchant (*musta'min*), his life and property, allowing him to carry out commercial transactions in Islamic territories.

Amāna. Trust, fiduciary relationship.

ʿĀmil al-qirāḍ. A merchant agent, a labor-investor, or a *tractator*.

Amīn. A trustee.

Amīr. Literally, prince, but the actual significance is a ruler or a governor.

Amīr al-baḥr. Admiral, commander of the fleet.

Amlāk. Proprietary.

Artab, (see *irdabb*).

ʿAwār or *ʿawāriya*. A defect or an imperfection in an article of merchandise.

Āyāt (sing. Āya). Miracles or Qur'ānic verses.

ʿAyn. Gold or capital.

Barṭīl (*hiba, maḥabba*, and *shōḥad* [Heb.]). A gratuity given to the crewmembers to take care of the cargo at various stages of the maritime venture.

Bayyina. Indisputable or conclusive evidence/proof.

Celeusta (Greek *keleustes*). The officer of a war galley.

Chreokoinōnia. Literally, partnership. It is a partnership in which one party is a capital-investor, while the other is a labor-investor. The

risks and profits of the investment are divided between the capital-investor and the manager.

Codex. A collection, official or unofficial, of imperial enactments rather than a complete statement of the law.

Commenda. Arrangement in which one party invests capital and another party trades with it on the understanding that they share the profits in an agreed upon ratio, and that any loss resulting from normal trading activity is borne by the investing party.

Culpa. Negligence, faulty judgment, or navigational misguidance (see *dolus*).

Daftar. A private mercantile bookkeeping, record or booklet containing reports about commercial transactions and shipping costs.

Ḍamān. Liability, accountability, guaranteeship, responsibility.

Ḍamān al-ʿaqd. Liability arising from an act contrary to a contract.

Ḍamān al-fiʿl. Liability arising from an unlawful act.

Dār al-Islām. Abode of Islam.

Dayyan. A Jewish judge, equivalent to the Muslim *qāḍī*.

Dhimmī. A Christian or a Jew living in the Islamic state and acknowledging the domination of Islam.

Dīwān al-Aḥkām. Office of the *qāḍī*'s clerk.

Dolus. Evil intent, embracing both malice and fraud; or, behavior that relies on deception to achieve its purpose; trickery, treachery, cunning.

Edict (*edictum*). A proclamation by a magistrate or the emperor.

Exercitor navis. A person who profits from the use of a ship, whether the owner or carrier.

Faqīh (pl. *fuqahāʾ*). A juris consult, scholar, or law doctor.

Fatwā (pl. *fatāwā*). An authoritative opinion on a matter of Islamic law.

Fiqh. The science of the Islamic jurisprudence.

Fulk. A type of oversized commercial vessel (Ark, Qurʾānic).

Geniza. Literally, "burial" or "hiding"; the word was derived from the Persian *ganj* ("treasury" or "storehouse"), which means to "conceal," "hide," or "preserve." Geniza thus came to mean a place for storing unusable books, writings, and ritual objects in order to prevent the desecration of the name of God, which might be found in them, while they await burial in a cemetery.

Gharar. Uncertainty. Technically it signifies the contract or transaction in which the object of contract or the commodity is not determined

for both or either contracting party and thus the contract involves an element of risk and uncertainty.

Ghifāra. Tribute.

Gubernator (Greek *kubernetes*). The ship's pilot.

Ḥabr (pl. *aḥbār*). A religious leader of the *dhimmī* community, *i.e.*, a priest or a rabbi.

Ḥadīth. A report of a saying or action of the Prophet, or such reports collectively.

Ḥajj. The official Muslim pilgrimage to Makkah in its full form.

Ḥanafī. A Sunnī legal *madhhab* (*q.v.*) ascribed to Abū Ḥanīfa (80–149/699–767).

Ḥanbalī. A Sunnī legal *madhhab* (*q.v.*) ascribed to Aḥmad Ibn Ḥanbal (167–241/780–855).

Ḥarbī. Alien merchant; it also signifies in the Geniza merchant letters a warship.

Ḥisba. The office of market superintendent or public morals supervision.

Ḥiyal shar'iyya. Legal devices; evasions for the purpose of circumventing, not violating, provisions of Islamic law.

Ḥukm (pl. *aḥkām*). The legal consequence of the facts of a case.

Hyperpyra. Super-refined gold coin of standard weight (4.55 gr.) but only 20.5 carats fine, introduced by Alexios I in 1092 C.E.

Ibāḥa. Permissible.

'Īd al-Ṣalīb, Feast of Cross, which is celebrated on the 26th or 27th of September.

Ījāb. Offer. The offer, as defined by Muslim jurists: the statement made in the first place by one of the two contracting parties raising the subject between the parties.

Ijāra. A hire, lease, or charter is a contract by which one person temporarily transfers to someone else the enjoyment, by personal right, of a thing or of an activity, in return for payment; it corresponds to the model of the Roman *locatio conductio operarum.*

Ijtihād. The exertion of a strong effort of personal reasoning to arrive at a solution to a legal case.

Irdabb. Dry measure of weight or capacity.

Istiqāma. Responsible professional behavior.

Jahbadh. Moneylender and banker.

Jubbah. A long outer garment, open in front, with wide sleeves.

Karrānī. Scribe or the accountant of the ship.

Kayl. A measure of corn and the like.

Keles. A single-banked small boat having few rowers and carrying modest amounts of cargo.

Kerkourus (Assyrian *qurqurru*, Arabic *qarqūr*). She is a modest-sized cargo carrier designated for the transport of grain on the Nile; the smallest size carried 225 tons, while the largest 450 tons—the average capacity was between 250 and 275 tons; the rig consisted of a single sail, the hull had sharp bows and a full stern.

Keratia. A unit of weight; the Greco-Roman *keration* was 0.189 gr. and the pound (*litra*) was reckoned at 1.728 *keratia*; the *solidus*, $^{1}/_{72}$ of the pound, weighed 24 *keratia*.

*Khārijite*s (or *khārijī*s). Members of a group of puritanical Muslim sects that developed during the late Umayyād and early ʿAbbāsīds periods. The school flourished and developed in the central Maghrib (Algeria) Tunisia, Persia, Arabia, and Omān.

Kharrāq. Literally, cutter; a type of Islamic ship in Egypt.

Khunn. A place in the ship's hull where sailors store their personal effects.

Kirā'. Leasing or hiring out. It aims at the beneficial use or enjoyment of a thing for a fixed period to time in return for a hiring fee; this term corresponds to *locatio rei* in Roman law.

Kommerkion. Literally, a tax on merchandise collected by customs officials on goods imported into the empire or reaching Constantinople by sea; this term appears in Byzantine sources around 800 C.E.

Kybaia. A large-sized sailing cargo galley, which was used on both open water and river to carry grain, wine, or other cargo.

Laqṭa. Salvage. It applies to the service performed by a salvager and the liability to remunerate him respect to his successful services.

Lawḥ. A board or plank of wood; it is another term to signify a ship.

Lembus. A small boat used as fishing, harbor, and river craft; like the *akatos* and *keles*, she was used for carrying cargo across open water and on rivers.

Lex Aquilia. The law of damage to property.

Locatio conductio operarum. Payment of fixed wages.

Madhhab (pl. *Madhāhib*). A school of Islamic law (religious creed, faith, domination), or generally the system followed by any given religious group.

Maḍmūn fī dhimmatihi. Personal guaranteed service (common carrier). It is a contract by which the master and owners of a ship destined for a particular place or port on a voyage engage separately

or collectively with a number of persons, connected or unconnected with each other, to transport their respective goods.

Magister navis. Master, captain or the person in charge of the care of the entire ship.

Majlis al-qaḍā'. Courthouse.

Mālikī. A Sunnī legal *madhhab* (*q.v.*) ascribed to Mālik Ibn Anas (97–179/715–795). The Mālikī school spread westwards from its first centers, Medīna and Egypt, over practically the whole of North Africa and over Islamic Central and West Africa. It was also predominant in Muslim Spain.

Mamālīk (sing. *Mamlūk*). White slaves.

Mare nostrum. A Latin term, which means "our sea."

Markab. A conveyance or riding vessel; it refers to types of ships propelled either by oars or sails, which navigated the high seas, coastlines, and inland waters.

Miḥrās. A watchtower that functions to alert local inhabitants against enemy attacks from the sea.

Milk raqaba. Right of ownership.

Milk al-taṣarruf. Right of disposition.

Milk al-yad. Right of possession.

Milla. Community.

Mina. A Byzantine coin.

Modius (pl. *modii*). A unit of weight. Byzantium had known various kinds of *modii*. The sea (*thalassios*) or imperial (*basilikos*) *modius* equaled 40 *logarrikai litrai*, or 17.084 liters; the monastic (*monasteriakos*) *modius*, 32 *logarikai litrai*, or 13.667 liters; the revenue (*annonikos*) *modius*, 26.667 *logarikai litrai*, or 11.389 liters. The Arabic *mudd* (*q.v.*) is derived from the Greek *modius*.

Mudd. A half bushel or a certain dry measure with which corn or grain is measured, equal to a *raṭl* and one third. The *mudd* capacity in ʿIrāq is about 1.05 liters, in Syria 3.673 liters, and in Egypt 2.5 liters.

Mufarriṭ. Negligent.

Muḥtasib. Market superintendent, public morals officer.

Muqāriḍ. Capital-investor or *commendator*.

Musta'min. An enemy alien merchant who was granted an *amān* pledge (*q.v.*) to trade and carry out business transactions in Islamic territories.

Nauphylakes. Those who keep watch on board, *i.e.*, guards or stevedores.

Nauticum fœnus (Greek *nautikois ergazethai*). Maritime loan.

Navicularius (Greek *naukleros*). Ship owner or charterer/carrier.

Nawāzil (sing. *nāzila*). Collections of legal responses, queries, judgments relating to actual incidents presented to a judge or jurisconsult for final settlement.

Nāzir. A port superintendant.

Neuron. Freight charges.

Nomisma. A coin; more specifically, the standard gold coin of 24 *keratia* (*q.v.*) which formed the basis of the late Roman and Byzantine monetary system. The Byzantine *nomisma* was identical to the Roman *solidus* (*q.v.*).

Paope or *Phaophi*. The name of second month of the Coptic calendar (from October 11th until November 9th).

Parmoute (*Farmou* or *Baramouda*). The name of the eighth month of the Coptic calendar (from April 9th until May 8th).

Peculium. The sum of money, property, or ship granted by the head of the household to a slave or son-in-power for his own use; in nautical legal terms, it signifies a manager of a ship.

Phaselus. A vessel designed for the transport of passengers rather than cargo.

Ploion (Latin *navis*). A ship or a boat.

Praetorian Praefectus. The chief military and civil advisors of the emperor and governors of the four great prefectures into which the later empire was divided.

Proreta (Greek *proreus*). The bow officer.

Qabūl. Acceptance. It is defined as the statement made in the second part by a party which completes the contract.

Qāḍī. A Muslim religious judge or magistrate.

Qirāḍ and *muqāraḍa* are derived from *q.r.ḍ*. Literally, a loan or a parcel of property, which a man cuts off from his other articles of property, and, which he receives back.

Qirillā (kingfisher). A type of Islamic commercial ship.

Qiyās. Analogy, syllogis.

Ra'y. Arbitrary or sound opinion of a judge.

Ribā. Usury.

Risālat ḥaml. (See *ruqāʿ al-ḥaml*).

Ribāṭ. A fortress.

Rubāʿī. One-quarter *dīnār*.

Ruqāʿ al-ḥaml. A bill of lading.

Safīna. A ship; she could be larger than a *markab* and propelled exclusively by sail.

Salāma. Safety and well-being of the cargo, *i.e.*, applicable to the goods delivered to their destination.

Satmī or *shatmī.* (See *ruqāʿ al-ḥaml*).

Sekreton. A governmental official in charge of the merchant fleet and registration of mercantile ships.

Shāfiʿī. A Sunnī legal *madhhab* (*q.v.*) ascribed to Muḥammad Ibn Idrīs al-Shāfiʿī (150–204/767–820).

Shāmil, sharanbal, or *ruqʿa.* Cargo book or log book.

Shānī, or *shīnī.* A common name used for galley (long ship), whose "hull resembles the form of a whale, and the stern that of a swallow."

Sharīʿa. The sacred law of Islam.

Sharika. Partnership.

Shīʿite. (Arabic, *Shīʿa* [party of ʿAlī]). General name for those Muslims that held to the rights of ʿAlī and his descendants to leadership in the community whether recognized by the majority or not; or any particular sect holding this position.

Solidus (*nomisma*). A standard gold coin theoretically weighing 4.55 gr. when it was introduced by Constantine the Great in 309 C.E.; it is used in the Digest to designate any actual sum of money mentioned in the texts.

Sulṭān. Authority, dominion, ruling power.

Sunna. Literally, the Prophet's sayings and doings; a precedent, normative legal custom.

Taʿabiyat al-matāʿ. (See *ruqāʿ al-ḥaml*).

Ṭabaqa (Pl. *Ṭabaqāt*). Generation(s) of jurist(s).

Taboullariois, pl. *taboullarioi* (Latin, *notarius*). Notary whose duty from the sixth century onwards was to register transactions and certify documents.

Tafrīṭ. Faulty judgment, negligence, or navigational misguidance. (See *mufarriṭ*).

ʿUlamāʾ. Learned jurists or scholars.

ʿUqūd. Contractual or commercial.

ʿUrafāʾ al-ṣināʿa. Inspectors whose main task was to insure the shipwrights' observance of technical standards and prevent them from using inferior and inadequate raw materials.

Urinatores (*urinator* means diver). Divers' guild specializing in salvaging jettisoned goods.

Usura or *fœnus*. Ordinary interest for money lent to mariners upon security and without any risk on the part of the lender.

Wadīʿa. A deposit, on commission.

Waiba (*wayba*). A measure of wheat, fifteen liters, four gallons.

Wālī. Governor.

Ẓāhirī. An Islamic law school founded by Dāwūd Ibn Khalaf (d. 270/884). The school basically spread in Andalusia. We know its legal legal reasoning and jurisprudence it promoted mainly from the writings of Ibn Ḥazm (d. 456/1065).

INTRODUCTION

Mediterranean Admiralty and Maritime Laws in Historical Perspective

The earliest maritime regulations in the Mediterranean world are thought to date back to 3000 B.C., the period during which the Old Kingdom of Egypt was established. Expanded commerce during the Early Bronze Age prompted the Pharaohs, whose authority extended beyond the coastal territories, to construct ports and shipyards to meet the demands of overseas trade. By the end of the first half of the third millennium, Egyptian ships frequented Levantine ports in the Mediterranean and the Aegean islands. Cedar and artifacts were shipped from Phoenicia and Syria, while Crete and Cyprus exported minerals. A few centuries later, merchants were transporting raw materials and finished objects such as precious stones, ivory, and rare woods from the Far and Near East to the Mediterranean area. In response to this burgeoning trade, shipwrights began building more sophisticated vessels that enabled seamen to expand their range and sail longer distances to more remote locations.[1] Although documented evidence of early Egyptian maritime codes has not been discovered, it is reasonable to postulate that overseas trade could not have had developed without regulations governing river and sea navigation.[2]

While trade was flourishing in the Mediterranean, the Sumerians were instituting the oldest maritime codification in the Tigro-Euphrates basin during the third and early second millennia B.C. These laws

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[1] Lionel Casson, *The Ancient Mariners: Seafarers and Sea Fighters of the Mediterranean in Ancient Times* (Princeton: Princeton University Press, 1991), 7–15.

[2] Jonathan Ziskind, "The International Legal Status of the Sea in Antiquity," *Acta Orientalia* 35 (1973), 35–40; Oded Tamuz, "Aspects of the Affinity to the Sea of Dwellers along the Eastern Mediterranean Coasts from the Amarna until the Assyrian Periods based on Written Evidence," (Unpublished. M.A. Thesis, Tel Aviv University, 1986) (Hebrew); John H. Wigmore, *A Panorama of the World's Legal System* (Saint Paul: West Publishing Company, 1928), 3:875–876; Edgar Gold, *Maritime Transport: The Evolution of International Policy and Shipping Law* (Lexington MA: D.C. Heath and Co., 1981), 1–3; Robert B. Revere, "'No Man's Coast': Ports of Trade in the Eastern Mediterranean," in *Trade and Market in Early Empires: Economies in History and Theory* ed. Karl Polanyi *et al.*, (Glencoe: The Free Press, 1957), 38–63.

were subsequently adopted by Hammurabi,[3] who incorporated them into his famous Code. His legal collection, considered by far the oldest documented code in legal history, consists of 282 sections, ten of which deal extensively with the rights and duties of shipwrights, ship owners and seamen, hiring and payment, the captain's liability, and maritime collisions.[4]

While Egyptian prominence in maritime commerce in the Mediterranean world was evident until the end of the second millennium B.C. the Phoenicians became the world's principal seafarers in the course of the first millennium.[5] They were to become the lords of the Mediterranean, colonizing most of its islands and strategic coastal positions: they colonized Cyprus and Rhodes, which were followed by Spain and North Africa, where they established Carthage. About 600 B.C., the Phoenicians established trading colonies along the Moroccan coasts on the Atlantic.[6] Historical records report that Pharaoh Necho (610–594 B.C.) was known to have trusted his best-qualified Phoenician mariners to circumnavigate Africa.[7]

For over a millennium the Phoenicians were the world's leading mariners and the undisputed rulers of the seas, contributing to naval design, the art of navigation, and the expansion of overseas trade.[8]

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[3] The period during which Hammurabi ruled Sumer is controversial. Four views are held by biblical archeologists and historians: I. 1848–1806, II. 1792–1750, III. 1711–1669, and IV. 1720–1678. It is most likely that Hammurabi reigned between 1711–1669.

[4] Godfrey R. Driver and John C. Miles, *The Babylonian Laws* (Oxford: Clarendon Press, 1952–1955), 1:427–435, 463–464, 473–475; W.W. Davies, "The Code of Hammurabi," in *Sources of Ancient and Primitive Law*, ed. by Albert Kocourek and John Wigmore (Littleton, Colorado: Fred B. Rothman and Co., 1979), 434–435, 441; William McFee, *The Law of the Sea* (Philadelphia: J.B. Lippincott Company, 1950), 39.

[5] Domenico A. Azuni, *The Maritime Law of Europe* (New York, 1806), 1:25.

[6] George Rawlinson, *History of Phœnicia* (London: Longmans Green and Co., 1889), 89–129; Ziskind, "International Legal Status of the Sea," 40–41.

[7] Donald Harden, *The Phoenicians* (New York, 1962), 170–179; Azuni, *Maritime Law of Europe*, 1:26–27; Casson, *Ancient Mariners*, 116–118.

[8] Harden, *Phoenicians*, 168–170; Rawlinson, *History of Phœnicia*, 271–282, 283–308; Dimitri Baramki, *Phoenicia and the Phoenicians* (Beirut, 1961), 36–47, 58–62; Raymond Weill, *Phœnicia and Western Asia to the Macedonian Conquest* (London: George G. Harrap and Co., 1940), 179–180; Harden, *Phoenicians*, 157–161. For further historical reference on the Phoenician nautical activities consult: Lucien Basch, "Phoenician Oared Ships," *Mariner's Mirror* 50 (1964), 134–162, 227–245; *idem*, "Trièrs grecques phéniciennes et égyptiennes," *The Journal of Hellenic Studies* 97 (1977), 2–10; *idem*, "De la survivance de la traditions navale phéniciennes dans la méditerranée de nos jours," *The Mariner's Mirror* 61 (1975), 229–253; Keith DeVries and M.L. Katzev, "Greek Etruscan and Phoenician Ships and Seafaring," in *A History of Seafaring* ed.

Through their extensive commerce and navigational skill, they acquired dominion over the sea, which they long retained.[9] Their influence and role in the Mediterranean declined drastically, however, after Alexander the Great captured their stronghold Tyre in 332 B.C. and massacred most of the town's residents.[10] Although few legal records exist, historians tend to believe that the Phoenicians were among the earliest seafarers to constitute and codify a universal sea law in the Mediterranean, which most likely formed the basis of subsequent maritime laws.[11]

Early indications of deteriorating Phoenician naval power can be traced as early as 538 B.C. when Cyrus, the Persian king (559–530 B.C.), destroyed the Babylonian Empire and subjugated the Phoenicians, using the port cities of Tyre and Sidon to support his troops with a fleet. Persian political dominance in the eastern basin of the Mediterranean lasted six decades during which the Phoenician presence was still discernible. This changed, however, on September 23, 480 B.C., when the Hellenic League under Athenian leadership defeated the Persian navy in the Strait of Salamis, permanently changing the political map and naval strategy in the Aegean Sea and subsequently the Mediterranean. As the newly dominant naval power in the Aegean, Athens' provided a degree of freedom for the Greeks as a whole, eliminated piracy from the Aegean, and made itself the maritime policeman for all of Greece, largely with the acquiescence of the other Greek states. By the time Alexander the Great

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by George Bass (London, 1972), 38–52; H. Gaster, "A Phoenician Naval Gazette," *Palestine Exploration Fund* 6 (1938), 105–155; E.C.B. Maclaurin, "The Phoenician Ship from Tyre Described in Ezekiel 27," *International Journal of Nautical Archaeology* 7 (1978), 80–82; S.W. Mathews, "The Phoenicians, Sea Lords of Antiquity," *National Geographic* 91 (1947), 148–184.

[9] Although Nebuchadnezzar captured Tyre in 580 after 13 years of siege, the Phoenicians remained the most powerful and dreaded seafarers in the Mediterranean world until the second half of the fourth century, when Alexander the Great swept through the Near East.

[10] Azuni, *Maritime Law of Europe*, 1:28–29.

[11] J. Dauvillier, "Le droit maritime phénicien," *Revue internationale des droits del'antiquité*, 3rd ser. 6 (1959), 33–63; Jean M. Pardessus, *Collection de lois maritimes* (Paris, 1828), 1:18–20; Alexander Justice, *A General Treatise of the Dominion of the Sea* (London, 1724), 18; Pitman Potter, *The Freedom of the Seas in History, Law, and Politics* (New York: Green and Co., 1924), 11; W. Paul Gormley, "The Development and Subsequent Influence of the Roman Legal Norm of 'Freedom of the Seas'," *University of Detroit Law Journal* 40 (1963), 565; Sidney Smith, "The Ship Tyre," *Palestine Exploration Fund* 85 (1953), 97–110; Azuni, *Maritime Law of Europe*, 1:276; Wigmore, *Panorama of the World's Legal System*, 3:880; McFee, *Law of the Sea*, 36–37; Gold, *Maritime Transport*, 5.

died in 323 B.C., the Aegean coast, Syria, Egypt, Persia, some western parts of India, and even territories in central Asia had fallen to the Greeks.[12]

Due to declining Phoenician naval capability by the early third century B.C., weakening of the Ptolemaic power in the Aegean by the 250s, and the subsequent decay of the Macedonian fleet, Cretan, Aeolian, and Illyrian pirates infested maritime trunk routes. The responsibility for trying to deal with these pirates gradually passed from the Ptolemies to the Rhodians, who had fought piracy since the early third century B.C. Rhodes succeeded Athens as the chief trading center in the Aegean owing to its naval power and location. In the third century, Rhodian commerce extended from Egypt to Crimea and from Mesopotamia to Italy, Sicily, and Carthage. Rhodian merchants settled in all the leading commercial centers and dealt with everything marketable, especially corn, slaves, luxury goods and select wines. This wide-ranging trade brought great prosperity to Rhodes, which was further enhanced by revenues from tolls, port dues, and dock charges. Although many skippers bound elsewhere had to pay a harbor tax of two percent [2%] of their cargo if they wished to stop in Rhodes, they were willing to do so because the Rhodian ports were ideal port of calls *en route* between Greece and Alexandria, one of the main centers of international trade and

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[12] Justice, *General Treatise*, 20–22; Albert Devine, "Alexander the Great," in *Warfare in the Ancient World*, ed. by John Hackett (New York: Facts on File, Inc., 1989), 104–128; Fik Meijer, *A History of Seafaring in the Classical World* (London: Croom Helm, 1986), 47–85; Nicholas G. Hammond, *Alexander the Great: King, Commander, and Statesman* (Park Ridge: Noyes Press, 1980), 91–121; Henry A. Ormerod, *Piracy in the Ancient World* (Liverpool; Liverpool University Press, 1924), 108–116; Potter, *Freedom of the Seas*, 16–25; McFee, *Law of the Sea*, 37; Casson, *Ancient Mariners*, 97–115. Athens' presence at sea exceeded beyond its military power. Documentary evidence establishes that Athenian lawmakers instituted and imposed their own sea laws within the maritime domain of Athens, especially when the Hellenic world relied heavily on the sea for transportation and communication. For further details, see Ziskind, "International Legal Status of the Sea," 43–46; Pardessus, *Lois maritimes*, 1:35–39; Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (London: MacMillan and Co., 1911), 2:367–378; Potter, *Freedom of the Seas*, 25–33; G. Chowdbaray-Best, "Ancient Maritime Law," *The Mariner's Mirror* 62 (1976), 81–82, 85; Edward E. Cohen, *Ancient Athenian Maritime Courts* (Princeton: Princeton University Press, 1973); Julie Vélissaropoulos, *Les Nauclères Grecs: Recherches sur les institutions maritimes en Gréce et dans l'Orient hellénisé* (Paris: Librairie Minard, 1980), especially 235–341; Pardessus, *Lois maritimes*, 1:35–52; Richard T. Robol, "Maritime Law in Classical Greek and Roman Literature," *Journal of Maritime Law and Commerce* 31 (2000), 520–524.

commerce.[13] Rhodian maritime supremacy peaked between the establishment of the settlement of Apamea in 188 and the Battle of Pydna in 168 B.C.[14] After the Third Macedonian War, Rhodes forfeited most of her mainland holdings following a ruinous economic setback after Delos was converted into a free port. This change seriously damaged Rhodes' material prosperity, but proved advantageous to Italian merchants. Forming an alliance with Rome in 164, Rhodes became a Roman territory, although the island republic existed as a theoretically independent state for another two centuries.[15]

As Rome itself became the mistress of the Mediterranean, the Romans came to view the Mediterranean as a lake and began to call it *mare nostrum*, "our sea."[16] Roman fleets were permanently stationed

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[13] *The Geography of Strabo* trans. by Horace L. Jones (London: G.P. Putman's, 1917–1933), 6:271–277 [14. 2. 5–10]; Arthur Desjardins, *Introduction historique à l'étude du droit commercial maritime* (Paris, 1890), 10; Ellen C. Semple, *The Geography of the Mediterranean Region: Its Relation to Ancient History* (London: Constable and Co, 1932), 600–601; Peter M. Fraser and George E. Bean, *The Rhodian Peraea and Islands* (Oxford: Oxford University Press, 1954); Richard M. Berthold, *Rhodes in the Hellenistic Age* (Ithaca: Cornell University Press, 1984), 90–101; John K. Davies, "Cultural, Social, and Economic Features of the Hellenistic World," in *The Cambridge Ancient History* (Cambridge: Cambridge University Press, 1984), 2:I, 285–290; Peter Green, *Alexander to Actium: The Historical Evolution of the Hellenistic Age* (Berkeley: University of California Press, 1990), 275–281; Cecil Torr, *Rhodes in the Ancient Times* (Cambridge: Cambridge University Press, 1885), 39–47; Brian Dicks, *Rhodes* (Newton Abbot: David and Charles Inc., 1974), 49–57; Casson, *Ancient Mariners*, 138–142, 163–167; Meijer, *History of Seafaring*, 141–145; Ormerod, *Piracy in the Ancient World*, 135–150. Many scholars believe that the earliest codification of the Rhodian Sea Law can be justifiably dated to the third or second century B.C., when Rhodes imposed its authority over the Mediterranean, the laws gaining their great authority because of the maritime strength of Rhodes. When the Romans became allied with the Rhodians, they perceived the judicial and practical utility of the Rhodian laws and borrowed largely from them.

[14] The Battle of Pydna ended a four-year war between the Antigonid dynasty of Macedonia and Rome. Due to Rome's victory, Macedonia was broken up into four wholly distinct confederacies.

[15] Justice, *General Treatise*, 17; Peter S. Derow, "Rome, the Fall of Macedon, and the Sack of Corinth," in *The Cambridge Ancient History* (Cambridge: Cambridge University Press, 1984), 8:318–319; Christian Habicht, "The Seleucids and Their Rivals," in *The Cambridge Ancient History* (Cambridge: Cambridge University Press, 1984), 8:334–338; Erich S. Gruen, "Rome and Rhodes in the second century B.C.: A Historiographical Inquiry," *The Classical Quarterly* 25 (1975), 58–81; Johannes H. Thiel, *Studies on the History of Roman Sea-Power in Republican Times* (Amsterdam: North Holland Publishing Company, 1946), 413–414; Berthold, *Rhodes in the Hellenic Age*, 195–112; Meijer, *History of Seafaring*, 183–184; Green, *Alexander to Actium*, 429; Phillipson, *International Law*, 2:378–380; Semple, *Geography of the Mediterranean*, 646–649.

[16] Potter, *Freedom of the Seas*, 25–35; Grehard Schmidt, "Mediterranean Elements in the British Navigation Act," *Speculum* 22 (1947), 342–350; Peter Brown, *The World*

at the most important commercial centers and maintained strategic positions in order to preserve peace and order along the coastal frontiers and secure the maritime trunk routes, particularly to assure the steady supply of grain to Rome.[17] To maintain dominion over the sea, the Romans forbade local inhabitants to build their own fleets, and gradually wiped out piracy Mediterranean waters.[18] With piracy vanishing from the Mediterranean except for the far western region, the trade routes became safe for two centuries—from the rule of Octavius Augustus (31–14 B.C.) until that of Septimus Severus (193–211 C.E.). Pirates could not sail from or land on Roman soil, garrisoned by imperial squadrons and naval warriors who together fought against pirate ships.[19] Clearly, absolute Roman dominion at sea resulted from territorial management and a military administrative system, with imperial troops and flotillas posted at measured distances along the shoreline serving as a preemptive weapon against piracy.

Although the Romans physically dominated the sea more than any other state in antiquity, the sea certainly was not their favorite element. The organization of the Roman navy showed a strong Hellenistic influence, as seen by the mass recruitment of shipwrights and seamen from the Hellenized East (Greece, Asia Minor, Syria and Egypt), which contributed fifty-two percent [52%] of the Misene

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of Late Antiquity A.D. 150–750 (New York: Norton Press, 1989), 150–159; Archibald Lewis, *Naval Power and Trade in the Mediterranean A.D. 500–1100* (Princeton: Princeton University Press, 1951), 21–32; Dimitrios G. Letsios, *Nomos Rhodion Nautikos-Das Seegesetz der Rhodier: Untersuchungen zu Seerecht und Handelsschiffahrt in Byzanz* (Rhodos: Institouto Aigaiou tou Dikaiou tes Thalassas kai tou Nautikou Diakiou, 1996), 59–60; Casson, *Ancient Mariners*, 198–212; Gormley, "Freedom of the Seas," 570–575.

[17] Meijer, *History of Seafaring*, 211–216. The Romans maintained many fleets in the islands of the Mediterranean and Aegean Seas; the Cyclades, Sporades, Cyprus, Crete, Rhodes, and Lesbos. Likewise, large fleets were permanently stationed at Alexandria, Carthage (Tunisia), and Seleuceia (Syria). With reference to Italy and the western Mediterranean, the major naval bases were Carales (Sardinia), Aleria (Corsica), Misenum, Ostia, Centumcellae, Ravenna, Forum Julii (Italy), and Dertosa (Spain), and Caesarea (north-west Algiers). For further details on the legal rules regarding the overseas transportation of grain and other staple food to Rome and subsequently Constantinople, see Boudewijn Sirks, *Food For Rome: The Legal Structure of the Transportation and Processing of Supplies for the Imperial Distribution in Rome and Constantinople* (Amsterdam: J.C. Publishers, 1991).

[18] The Romans prevented local inhabitants from building their own fleets due to a fear of the locals using them against the Roman imperial installations and vessels.

[19] Chester G. Starr, "Coastal Defense in the Roman World," *American Journal of Philology* 64 (1943), 56–70; *idem*, *The Roman Imperial Navy 31 B.C.–A.D. 324* (Chicago: Ares Publishers, 1993), 1–8; Ormerod, *Piracy in the Ancient World*, 248–259; Justice, *General Treatise*, 24–25; Ziskind, "International Legal Status of the Sea," 48–49.

fleet and twenty-eight percent [28%] of the Ravennate fleet.[20] While Roman citizens rarely served in the fleet since they were reserved for the legions, men in the eastern Mediterranean considered such service an honor and were admired by family and friends.[21] Statistical data in recent publications substantiate a hypothesis of Schomberg, who in 1786 concluded that "the Romans were never conspicuous as a *maritime power*, either in a military or a commercial sense," and were ignorant of the true advantages to be derived from naval power.[22] Greek influence on Roman naval history is also discernible in the legal sphere, where certain articles of commercial law, especially those dealing with jettison of cargo and contribution, were incorporated into the Roman legal codices as long as they did not contradict Roman law.

When the Emperor Theodosius I died in 395, the Roman Empire was split between his two heirs into two distinctive political units. Arcadius reigned in the east from Constantinople, whereas Honorius governed the west from Milan. The territorial integrity and administrative system of the western provinces survived for a few decades, until in 476, the last Roman emperor in the west, Romulus Augustulus (31 Oct. 475 to 4 Sept. 476), was deposed by Odoacer, a Germanic military leader. The barbarian tribes then divided the western provinces among themselves. The Vandals controlled a "sea empire" consisting of North Africa; their hold on the Balearics, Sardinia, and perhaps Corsica is disputed. The Visigoths ruled Spain and southern France. The Ostrogoths controlled Italy and the Merovingian Franks ruled in France. It was only later, during the reign of Justinian I (527–565),[23]

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[20] The imperial Roman navy in Italy consisted of two major units. The Adriatic fleet was based in Ravenna, on the southern bank of the Po, while the Mediterranean fleet was stationed in Misenum on the central western coast of Italy.

[21] Starr, *Roman Imperial Navy*, 74–78; Meijer, *History of Seafaring*, 216–218. In addition to naval technology, the Greek mariners and shipbuilders introduced their naval jargon to the Roman maritime establishment. For example, the Latin term *gubernator* is derived from the Greek *kubernetes* which denotes the ship's pilot; *celeusta* originates from *keleustes*, the "officer" of a war galley, who set the beat for the oarsmen with a flute; *proreta* is derived from the Greek *proreus*, meaning the bow officer.

[22] Alexander C. Schomberg, *A Treatise on the Maritime Laws of Rhodes* (Oxford, 1786), 332, 335.

[23] The emperor Justinian was of Gothic origin. His native name was Uprauda, a word said to mean upright, and thus to have found an equivalent in the Latin Justinianus. He was born around 482 at Taurisium in Bulgaria. Adopted by his uncle, the Emperor Justin, he succeeded him as sole emperor in 527. See Thomas C. Sandars, *The Institutes of Justinian* (Westport, Connecticut: Greenwood Press, 1970), xxx.

that these kingdoms were subdued. He reestablished Romano-Byzantine authority in the Mediterranean territories, and imposed his power over the sea, which lasted until the Persian invasion of eastern Byzantium.[24]

Legislative Sources of Byzantine Sea-Laws

Shortly after Justinian I became sole emperor on August 1st, 527, he conceived his plan of a new collection of imperial constitutions. A comment attributed to him states that an emperor "must be not only glorified with arms, but also armed with laws, so that the time of war and the time of peace alike may be rightly guided; he must be the strong protector of law as well as the victor over vanquished enemies."[25] He made this statement when he realized that Roman law was in chaos and that a strong empire could not be built without organizing the legal system. To codify the Roman law, the Emperor commissioned Tribonian[26] in 529 to collect and publish

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[24] Percy T. Fenn, "Justinian and the Freedom of the Sea," *The American Journal of International Law* 19 (1925), 716–727; George Ostrogorsky, *History of the Byzantine State* (New Brunswick Rutgers University Press, 1991), 69–75; Averil Cameron, *The Mediterranean World in Late Antiquity* (London: Routledge, 1994), 1–4, 33–42; Brown, *World of Late Antiquity*, 118–135; Lewis, *Naval Power and Trade*, 21–33; Letsios, *Das Seegesetz der Rhodier*, 59–60. The term given to the period from the fourth through mid-seventh centuries is debated by contemporary scholars. While a group calls it "early Byzantine," another refers to it as "late Roman," thus affiliating Justinian I among the last Roman emperors. Latin, Greek, and Arabic sources—historical and geographical literature, travel accounts, and documentary evidence from Egyptian papyri and Geniza—refer to the Byzantine world as Roman, *i.e.*, the term Byzantium does not exist in the historical records. For instance, written sources from the Muslim world call the Mediterranean Sea *Baḥr al-Rūm* (Sea of Romans) and Christians were known as *Rūm* (Romans). In order to avoid confusion, this study will refer to the legal edicts such as the Digest and others that were written before 600 as Romano-Byzantine. The Rhodian Sea Law, which was promulgated from between the seventh and eighth centuries, will be considered a pure Byzantine codification.

[25] Aleksandr A. Vasiliev, *History of the Byzantine Empire 324–1453* (Madison: The University of Wisconsin Press, 1958), 1:142.

[26] A well-versed jurist of Roman law and a high-ranking official at the court of Justinian I, who in February 528 was member of the emperor's commission to draft a law code (Codex Justinianus). He was born in Pamphylia (the coastal plain of southern Asia Minor) before 500 and died around 542. In addition to the completion of Codex Justinianus, Tribonian was appointed by Justinian I to compile the Novels of Justinian, which did not come into existence due to Tribonian's death. Another contribution attributed to him is the gradual replacement of Latin by Greek in legislation. See Michael Maas, "Roman History and Christian Ideology in Justinianic Reform Legislation," *Dumbarton Oaks Papers* 40 (1986), 27; Vasiliev, *History of the Byzantine Empire*, 1:144–145.

Codex Theodosianus,[27] Codex Gregorianus,[28] and Codex Hermogenianus.[29] In November 534 Justinian issued a revised edition of the Codex, thus completing the codification consisting of three law books: the Digest (the Pandectus),[30] the Codex,[31] and the Institutes:[32] notably, there is no reference at all to the Nomos Rhodion Nautikos (henceforth "N. N."), either in the Codex or in the Institutes. During the remainder of his reign, Justinian made amendments and additions to the Corpus Juris Civilis. That new excerpt called the Noveles (literally "new laws") was, unlike all previous legal works, written and promulgated in Greek. Justinian's imperial edicts were first enforced throughout the eastern provinces of his empire, but never imposed on the Western Roman Empire prior to April 13th, 534, when he recaptured North Africa, Sardinia, Corsica, and the Balearics from the Vandals and restored Byzantine administration in these provinces.

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[27] A Latin law book named after the emperor Theodosius II (408–450), which was published on February 15th, 438, but practically implemented on January 1st, 439. It contains more than 2,500 constitutions that were issued between the years 311–437. As for maritime issues discussed in the Theodosian Code, see Clyde Pharr *et al.*, *Theodosian Code and Novels and the Simondoan Constitutions* (Princeton: Princeton University Press, 1952), 17, 81, 98–99, 119, 174–175, 191, 321, 361–363, 391–400, 420–422, 437, 495, 540; Azuni, *Maritime Law of Europe*, 1:307–312.

[28] A collection of imperial rescripts issued between 291 and 294 by a certain Gregory (?).

[29] A collection of imperial edicts which were published immediately after Codex Gregorianus.

[30] The Digest is a collection of edicts of classical Roman jurists. It was compiled and published to bring the innumerable and often contradictory rulings of Roman jurists into an ordered system. Its excerpts were made from the legal literature of Domitius Ulpianus of Tyre (d. 228), Julius Paulus (first half of the third century), as well as legal materials of other distinguished Roman legists. The edicts were arranged according to subject matter into fifty books subdivided into a varying number of titles. The most important MS of the Digest is the Florentina, which is dated from the sixth century. The Digest was incorporated into the Basilika, though the sequence of laws was changed Alexander P. Kazhdan *et al.*, *The Oxford Dictionary of Byzantium* (Oxford: Oxford University Press, 1991), 1:623.

[31] A book of fifty imperial decisions that had been promulgated at first on the 7th of April 529. Since it was a very imperfect work, it was determined to revise that Code and incorporate the Fifty Decisions in the revised edition. On November 16th, 534, the so-called Codex Repetitae Praelectionis was promulgated and made authoritative. The Code which is divided into twelve books, is arranged nearly in the same manner as the Digest. See Sandars, *Institutes of Justinian*, xxxiii–xxxiv.

[32] A collection of imperial laws which was compiled by two law professors, Theophilus and Dorotheus of Constantinople and Berytus, under the direction of Tribonian and promulgated on the 30th of December, 533. As a textbook, the materials and subjects are modeled and arranged in a pedagogical manner as nearly similar as the writings of the classical Roman jurists. See Sandars, *Institutes of Justinian*, xxxii–xxxiv.

Similarly, Justinian's Code was not enforced in Italy until December 536, when he appointed Fidelis as his own *praetorian praefectus* ("vice emperor") for Italy. Justinian's Code was never introduced into southern Gaul, ruled by the Burgundians and Visigoths, which was a region Byzantium never conquered. Right after the Byzantine victory over Totila, the Ostrogothic king, at the battle of Busta Gallorum in 552,[33] Byzantium became the mistress of the Mediterranean, Adriatic, Ionian, Aegean, and Black seas, as well as parts of the Red Sea. As a result, the Justinianic imperial laws were indisputably enforced in the overseas Byzantine territories until the first decade of the seventh century, when the Persians launched their attacks against the eastern provinces of Byzantium and captured Asia Minor, Levant, and Egypt between 610 and 628.[34] Negative effects of the Persian occupation were more discernible, however, in the political, rather than the socioeconomic, administrative, and judicial spheres.

With the exception of the *lex Rhodia de jactu* (Rhodian Law of Jettison), most maritime matters were almost certainly administered and adjudicated in accordance with the regulations instituted by classical Roman lawyers and provincial customary practices until the end of the sixth century and even later.[35] In March 741, the Ecloga

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[33] On the wars between Byzantium and the Ostrogoths over Italy, Corsica, and Sardinia, and the Greek naval superiority over the Italians at the maritime battle of Sena Gallica (autumn of 551), consult John B. Bury, *History of the Later Roman Empire* (London: Macmillan and Co., Ltd., 1923), 259–269.

[34] Maas, "Roman History and Christian Ideology," 19–28; Sirks, *Food for Rome*, 112–116, 165–168, 209–210, 217–220; Ostrogorsky, *History of the Byzantine State*, 26, 75–77; Vasiliev, *History of the Byzantine Empire*, 1:143–147; Azuni, *Maritime Law of Europe*, 1:272–278, 313–320; Joan M. Hussey *et al.*, *The Cambridge Medieval History* (Cambridge: Cambridge University Press, 1967), 4:II, 55–60.

[35] On the reception of the N. N. in Roman judicial institutions and legal codices, consult: Letsios, *Das Seegesetz der Rhodier*, 215–223; Schomberg, *Laws of Rhodes*, 331–359; Azuni, *Maritime Law of Europe*, 1:265–295; Pardessus, *Lois maritimes*, 1:209–230; Phillipson, *International Law*, 367–384; Kathleen M. Atkinson, "Rome and the Rhodian Sea-Law," *Ivra* 25 (1974), 46–92, esp. 73–88; W. Paul Gormley, "The Development of the Rhodian-Roman Maritime Law to 1681, with Special Emphasis on the Problem of Collision," *Inter-American Law Review* 3 (1961), 317–326; *idem*, "Freedom of the Seas," 566–570, 576–577; McFee, *Law of the Sea*, 36–43; Gold, *Maritime Transport*, 10–15; Robert D. Benedict, "The Historical Position of the Rhodian Law," *Yale Law Journal* 18 (1909), 223–242; Charles S. Lobingier, "The Maritime Law of Rome," *Juridical Review* 47 (1935), 2–14; Paul Huvelin, *Étude d'histoire du droit commercial romain* (Paris, 1929), 184–195; Jean Rougé, *Recherches sur l'organisation du commerce maritime en méditerranée sous l' Empire romain* (Paris, 1966), 407–413; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town, 1990), 406–412. As to customary laws, legal and historical evidence proves

('selection' or 'extract') was published by Leo III (717–741) and Constantine V (741–775).[36] By the ninth century Byzantine emperors published the Basilika,[37] Synopsis Basilicorum,[38] and Tipoukeides.[39] As for the promulgation of the N. N., its precise year is still unknown. Ashburner, an authoritative scholar in this field, as well as most legal historians, place it some time between 600 and 800.[40] Another group of Byzantinists attribute it to the Isaurian dynasty (717–802), claiming that this compilation was adopted and instituted as an Imperial Law instead of the maritime formulation found in Justinian's

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that on the eve of Islamic expansions, shipping in the Mediterranean regions was primarily controlled by the church, state, rich merchants, and middle class entrepreneurs. For instance, commercial ships of the church of Alexandria sailed east to India and Ceylon and west to Marseilles at the time when the Byzantines reigned supreme in the Mediterranean, and Mediterranean commerce was largely in Syrian and Egyptian hands. The patriarch of the church hired seamen, maintained a commercial fleet and a dockyard, and regulated riverfaring and seafaring laws. See George R. Monks, "The Church of Alexandria and the City's Economic Life in the Sixth Century," *Speculum* 28 (1953), 355–362; Rogers S. Bagnall, *Egypt in Late Antiquity* (Princeton: Princeton University Press, 1993), 289–293; Charles P. Sherman, "The Roman Administrative Marine," in *Studi in onore di Salvatore Riccobono nel XL anno del suo insegnamento* ed. by G. Baviera *et al*., (Palermo: Arti grafiche G. Castiglia, 1936), 2:65–76; Raphael Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri 332 B.C.–640 A.D.* (Warsaw: Polish Philological Society, 1948), 2:91–93; Mostafa el Abbadi, "A Code of Navigation on the Nile in Greco-Roman Egypt," *Graeco-Arabica* 4 (1991), 157–162; D.G. Letsios, "Sea Trade as Illustrated in the 'Rhodian Sea Law' with Special Reference to the Reception of Its Norms in the Arabic Ecloga," *Graeco-Arabica* 6 (1995), 209–225; *idem*, *Das Seegesetz der Rhodier*, 71.

[36] The title runs as follows: "An abridged selection of laws, arranged by Leo and Constantine, the wise and pious kings, from the *Institutes*, Digest, *Code*, *Novels* of the Great Justinian, and corrected with a view to greater humanity." See Vasiliev, *History of the Byzantine Empire*, 1:241.

[37] A collection of laws that were instituted under the emperor Basil I [867–886] and completed in 888 during the first years of the reign of Leo VI [886–912].

[38] An abridged version of the Basilika, which was probably produced in the tenth century.

[39] Panayotis J. Zepos, "Les Réglements juridiques sur le navire en droit byzantin," in *La navigazione mediterranea nell'alto medioevo* (Spoleto: Settimane di Studio del Centro Italiano di Studi sull'alto Medioevo XXV, 1978), 741–745; John F. Haldon, *Byzantium in the Seventh Century: The Transformation of a Culture* (Cambridge: Cambridge University Press, 1997), 254–264; F.H. Lawson, "The Basilica," *Law Quarterly Review* 46 (1930), 486–501 and 47 (1931), 536–556; Ostrogorsky, *History of the Byzantine State*, 233–260; Vasiliev, *History of the Byzantine Empire*, 1:244–247; Hussey *et al*., *Cambridge Medieval History*, 4:II, 62–71.

[40] Vasiliev, *History of the Byzantine Empire*, 1:240–247; Walter Ashburner, *The Rhodian Sea Law* (Oxford: Clarendon Press, 1909), lxxv; Edwin H. Freshfield, *A Manual of Later Roman Law: The Ecloga* (Cambridge: Cambridge University Press, 1927), 56; Zepos, "Réglements juridiques sur le navire en droit byzantin," 744; Wigmore, *Panorama of the World's Legal System*, 878–879; McFee, *Law of the Sea*, 38–49; Cohen, *Ancient Athenian Maritime Courts*, 3–6.

enactments.[41] A third viewpoint determines that compiling and promulgating the treatise is an initiative of Photios,[42] going back to his first patriarchate from 858 to 867. A fourth associates it with Leo VI (886–912), who himself ordered its incorporation in the Basilika, or appointed a person of his entourage to do so. It appears in Book LIII, which deals exclusively with maritime affairs as established by the N. N. Consequently some scholars tend to accept it as an original part of the Basilika.[43] The fifth opinion holds that the N. N. originated about the time of Stylianos Zaoutzes.[44] Still others assume that the rubric and prologue were drawn up in southern Italy.[45] Be that as it may, the promulgation and initiative of this compilation is still undecided though it is most likely to have been codified during the Iconoclasm period.

The N. N. consists of three parts. Part One is the Prologue, describing its ratification by the Roman emperors.[46] Part Two provides a sort of table that lists the articles for Part Three and contains clauses of a general nature, elementary axioms and postulates. It consists of

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[41] Freshfield, *Manual of Later Roman Law*, 56–68; Huvelin, *Histoire du droit commercial romain*, 185; Gormley, "Development of the Rhodian-Roman Maritime Law," 329; Archibald Lewis, "Periods in the History of the Roman Empire," in *The Sea and Medieval Civilizations* (London: Variorum Prints, 1978), XIII:12. The manuscripts of the N. N. appear in many Byzantine documents, always either juxtaposed or within other manuscripts, forming a relatively small part the total document. The N. N. is often in company with the Farmer's Law or the Soldier's Law.

[42] Photios was the Patriarch of Constantinople (858–867 and 877–886), an intimate of the powerful, a courtier, an intellectual, an encyclopedist and a teacher. He was related to the imperial family and held the post of first government secretary in the senate.

[43] Gormley, "The Development of the Rhodian-Roman Maritime Law," 329; Lobingier, "Maritime Law of Rome," 16–17; Zepos, "Réglements juridiques sur le navire en droit byzantin," 745; Atkinson, "Rome and the 'Rhodian Sea-Law'," 93–96; McFee, *Law of the Sea*, 35; Letsios, *Das Seegesetz der Rhodier*, 74–75; Andreas Schminck, "Probleme des sog. 'Nomos Rhodion Nautikos," in *Griechenland und das Meer*, ed. by E. Chrysos *et al.* (Mannheim und Möhnesee 1999), 171–172.

[44] Stylianos Zaoutzes (824?–899) was born in Macedonia of Armenian origin, and died in Constantinople. He was a high-ranking official under Basil I and Leo VI. He was *protospatharios* (a dignitary of the imperial hierarchy) at the end of Basil's reign. He directed Leo VI's policy and acquired even more influence when his daughter Zoe became Leo's mistress and in 898, his spouse. See Kazhdan *et al.*, *Oxford Dictionary of Byzantium*, 3:2220.

[45] Schminck, "Probleme des sog 'Nomos Rhodion Nautikos," 172–178; Letsios, *Das Seegesetz der Rhodier*, 70–71.

[46] This Prologue, transmitted in but a few manuscripts from the twelfth century onwards, is today considered a late addition inspired by the information—itself dubious—contained in the often inconsistently transmitted headings. See Kazhdan *et al.*, *Oxford Dictionary of Byzantium*, 3:1792.

nineteen articles, seven of which [Articles 1–7] fix the shares (payments) of the ship's master, steersman, carpenter, crew, and cook. Articles eight through fifteen deal in substance with the accommodation of merchants and ordinary passengers on board. Articles sixteen through nineteen deal with the method of reckoning a ship's cargo capacity, maritime loan, *chreokoinōnia* and contribution. Part Three is the longest, consisting of forty-seven statutes dealing with the manifold maritime regulations that provide legal solutions to problems that may emerge in various stages of a maritime venture.[47] With a few exceptions, the statutes of Part Three are arranged in a logical order. Disciplinary laws, especially theft and murder, are treated in Articles one through eight; articles twelve through fifteen refer to deposit of commodities and personal effects with the captain; articles sixteen through eighteen deal with maritime loans; contracts between lessor and lessees are covered in articles eleven and nineteen through twenty-five; salvage is treated in articles forty-five through forty-seven; while Articles nine, ten, and twenty-six through forty-four, the largest portion of Part Three of the N. N., relate to jettison and contribution. Overall, it is a comprehensive collection consisting of the basic admiralty law, which regulated carriage by sea, commercial maritime transactions, and personal behavior of seamen and passengers in the Christian Mediterranean for a few centuries.

The Mediterranean between the Domination of Byzantium and of Islam

For many centuries, the countries of the Mediterranean basin were an integral part of the Roman Empire. The political map had undergone several changes by the first quarter of the seventh century, however, when the Persians captured the eastern territories of Byzantium. By the time Heraclius reversed Khusru II's conquests and restored the status quo between Constantinople and Ctesiphon, a new religion and political entity had emerged in Mecca and flourished in Medīna led by Muḥammad Ibn ʿAbd Allāh, a prophet and a statesman. By the time of his death in 632, prophet Muḥammad asserted his authority over a vast region of the Arabian Peninsula,

[47] Articles forty-eight through fifty are translations from passages of the Code and the Digest. The four titles in Appendix D (I, II, III and IV) were added to the original text in the eleventh and thirteenth centuries. See Ashburner, *op. cit.*, lxxv.

laying the foundations for a future Islamic Empire and leaving the *Qur'ān* and his tradition to guide his Muslim followers, although he never established an elaborate administration or army. His successors fought against recalcitrant tribes, forced them into subjection, expanded the sphere of Muslim power beyond what it had been in Muḥammad's time, and even fought concurrently on two fronts, the Persian and Byzantine.[48] The Islamic victories against the Sassanids at al-Qādisiyya (15 A.H./636 C.E.) and Heraclius at Yarmūk (Rajab 5th, 15 A.H./August 12th, 636 C.E.) changed the course of Near East history. By the 650s, the Sassanid Empire ceased to exist and Byzantium lost Syria, Palestine, Egypt, and the eastern territories of North Africa to the Muslims.[49]

In spite of the subsequent Islamic military supremacy on land, Byzantium remained the dominant sea power in the Mediterranean. Except for an insignificant minority of Omānī and Yemenī mariners, who joined ʿAmr Ibn al-ʿĀṣ's expedition against Egypt, the overwhelming majority of Muslim conquerors were unfamiliar with maritime warfare. With time, however, Muʿāwiya Ibn Abī Sufyān and Ibn al-ʿĀṣ, the *wālī*s (governors) of Syria and Egypt, came to realize that their territories needed to look seaward rather than landward, noting how weakly they controlled their coastal frontiers, especially when Byzantium preserved its naval superiority offshore. Like their Roman predecessors,[50] Muslim commanders moved quickly to establish a defense system known in Arabic as *ribāṭ*s (fortresses) and *miḥrās*es (watchtowers) located within eye contact with each other, to protect the coast against possible Byzantine maritime expeditions.[51] Later, taking advantage of experienced Greek and Coptic seamen,

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[48] By 634, Muslim troops under the command of ʿAmr Ibn al-ʿĀṣ defeated a Byzantine army at the Battle of Ajnādayn (southeast of Ramle, Palestine).

[49] Islamic military expansion in the Mediterranean has been exhaustively studied by contemporary historians namely: Fred M. Donner, *The Early Islamic Conquests* (Princeton: Princeton University Press, 1981), 91–220; Garth Fowden, *Empire to Commonwealth: Consequences of Monotheism in Late Antiquity* (Princeton: Princeton University Press, 1981), 138–152; Walter E. Kaegi, *Byzantium and the Early Islamic Conquests* (Cambridge: Cambridge University Press, 1993); Moshe Gil, *Palestine during the First Muslim Period 634–1099* (Tel Aviv: Tel Aviv University Press, 1983), 1:9–61 (Hebrew); Ira M. Lapidus, *A History of Islamic Societies* (Cambridge: Cambridge University Press, 1991), 37–53; Haldon, *Byzantium in the Seventh Century*, 216–219; Brown, *World of Late Antiquity*, 189–203.

[50] Starr, "Coastal Defense in the Roman World," 56–70.

[51] H.S. Khalilieh, "The *Ribāṭ* System and Its Role in Coastal Navigation," *Journal of the Economic and Social History of the Orient* 42 (1999), 212–225.

shipwrights, and former Byzantine maritime installations in Syria, Palestine, and Egypt, Muʿāwiya commanded the first Islamic maritime expedition against Cyprus in 28/648–9. In the subsequent year he launched a second attack on Arwād (Arados), an island off the Syrian coast, and burned the island's city.[52] Islamic fleets, the Syrian one in particular, intensified their activities against Byzantine targets in the eastern Mediterranean and Aegean and assaulted Crete, Cos, Cyprus, and Rhodes in 33/653–4, ultimately scoring their first naval victory against the Byzantines at Phoenix (Dhāt al-Ṣawārī) in 34/655. The Islamic naval triumph at Phoenix weakened the Byzantine maritime presence in the eastern Mediterranean. As a result, the Umayyāds took advantage of the weakness of the Byzantine navy in the eastern basin of the Mediterranean by launching a series of naval raids and attacks against Constantinople and other strategic Aegean and Mediterranean islands until the fall of their caliphate in Damascus in 132/750. Despite the Islamic maritime emergence, the Mediterranean remained shared by Christians and Muslims, and neither party could view it as "*mare nostrum*."[53]

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[52] Lawrence I. Conrad, "The Conquest of Arwād: A Source Critical Study in the Historiography of Early Medieval Near East," in *The Byzantine and Early Islamic Near East; Problems in the Literary Source Material*, ed. Averil Cameron and Lawrence Conrad (Princeton: The Darwin Press, 1992), 317–401.

[53] The Byzantine-Islamic military struggles over the Mediterranean during the seventh and eighth centuries is beyond the scope of the current study. However, for deeper insight on this topic, consult: Lewis, *Naval Power and Trade*, 54–97; Aḥmad ʿAbbādy and Sayyed Sālem, *Tārīkh Baḥriyya al-Islāmiyya fī Miṣr wal-Shām* (Beirut: Dār al-Nahḍa al-ʿArabiyya, 1981), 28–36; Wilhelm Hoenerbach, *La Marina Arabe del Mar Meditrráneo en Tiempos de Muʿāwiya* (Tiṭwān: Instituto Muley el-Hasan, 1954); Aḥmad R. Aḥmad, *Tārīkh Fann al-Qitāl al-Baḥrī fī al-Baḥr al-Mutawssiṭ 35–978/655–1571* (Cairo: Wizārat al-Thaqāfa, 1986), 9–21; Aly M. Fahmy, *Muslim Sea-Power in the Eastern Mediterranean from the Seventh to the Tenth Century A.D.* (Cairo: National Publication and Printing House, 1966), 80–148; Romilly J. Jenkins, "Cyprus between Byzantium and Islam, A.D. 688–965," in *Studies Presented to David Moore Robinson*, eds. G.E. Mylonas and D. Raymond (Saint Louis: Washington University, 1953), 2:1006–1014; Costas Kyrris, "The Nature of the Arab-Byzantine Relations in Cyprus from the Middle of the 7th to the Middle of the 10th Century A.D.," *Graeco-Arabica* 3 (1984), 149–175; Torr, *Rhodes under the Byzantines*; Clifford E. Bosworth, "Arab Attacks on Rhodes in the Pre-Ottoman Period," *Journal of the Royal Asiatic Society* 6 (1996), 157–164; Lawrence I. Conrad, "The Arabs and the Colossus," *Journal of the Royal Asiatic Society* 6 (1996), 165–187; Herbert Maryon, "The Colossus of Rhodes," *The Journal of Hellenic Studies* 76 (1956), 68–86; Dicks, *Rhodes*, 59; Andreas Stratos, "The Naval Engagement at Phoenix," in *Essays in Honor of Peter Charanis*, ed. Ageliki E. Laiou-Thomadakis (New Brunswick: Rutgers University Press, 1980), 229–247; Vassilios Christides, "The Naval Engagement of Dhāt Aṣ-Ṣawārī A.H. 34/A.D. 655–656: A Classical Example of Naval Warfare Incompetence," *Byzantina* 13 (1985),

In separate, spontaneous, and uncoordinated expeditions, Muslim sea powers attacked Sicily and Crete in 212/827. While the Aghlabīd fleet, commanded by Asad Ibn al-Furāt, an old jurist of Khurasānī origin, raided Sicily, an Andalusian flotilla led by Abū Ḥafṣ ʿUmar Ibn ʿĪsā Ibn Shuʿayb al-Ballūṭī landed in and conquered Crete.[54] The assaults on Sicily and the conquest of Crete marked the beginning of a new era in Mediterranean maritime history. Within a few decades Islamic fleets captured the islands of Majorca, Minorca, Ibiza, Pantelleria, Malta, Sardinia, and Cyprus.[55] Their military expeditions extended to Christian coasts and their hinterlands. A series

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1331–1345; Maḥmūd A. ʿAwwād, *Al-Jaysh wal-Usṭūl al-Islāmī fī al-ʿAṣr al-Amawī* (Hebron: Al-Adabiyya lil-Ṭibāʿa wal-Nashr, 1994), 251–274; Christophe Picard, *La mer et les musulmans d'Occident au Moyaen Age* (Paris: Presses Universitaires de France, 1997); Hassan S. Khalilieh, *Islamic Maritime Law: An Introduction* (Leiden: E.J. Brill, 1998), 6–7, f. 15; Antonio Carile and Salvatore Cosentino, *Storia della Marineria Byzantina* (Bologna: Lo Scarabeo, 2004), 11–13, 23–32; Letsios, *Das Seegesetz der Rhodier*, 59–60, 71, 83–85, 243.

[54] Ibn ʿAbd al-Munʿim al-Ḥimyarī, *Kitāb al-Rawḍ al-Miʿṭār fī Khabar al-Aqṭār* (Beirut: Librarie du Liban, 1975), 51; Al-Qāḍī Abū al-Faḍl ʿIyāḍ Ibn Mūsā Yaḥṣubī, *Tartīb al-Madārik wa-Taqrīb al-Masālik li-Maʿrifat Aʿlām Madhhab Mālik* (Ribāṭ: Wizārat al-Awqāf wal-Shuʾūn al-Maghribiyya, 1965), 4:365; Muṣṭafā A. Ṭāher (ed.), *Kitāb Akriyat al-Sufun wal-Nizāʿ bayna Ahlihā*, *Cahiers de Tunisie* 31 (1983), 9–10; Vassilios Christides, "Raid and Trade in the Eastern Mediterranean: A Treatise by Muḥammad bn. ʿUmar, the *Faqīh* from Occupied Moslem Crete, and the *Rhodian Sea Law*, Two Parallel Texts," *Graeco-Arabica* 5 (1993), 65–67; *idem*, *The Conquest of Crete by the Arabs (CA. 824): A Turning Point in the Struggle between Byzantium and Islam* (Athens, 1984), 133–136; Jorge L. Delgado, *El poder naval de Al-Ándalus en la época del Califato Omeya* (Granada: Universidad de Granada, 1993), 352–354; Abraham L. Udovitch, "An Eleventh Century Islamic Treatise on the Law of the Sea," *Annales Islamologiques* 27 (1993), 38–39, f. 4. Many jurists and scholars immigrated to the island fortresses (*thughūr al-jazariyya*) from North Africa and Spain, while others were born, grew up, and practiced law there. Crete's fertile lands, natural riches, and location, linking the Aegean and Byzantine worlds with the Islamic Mediterranean, attracted many Muslim immigrants from Andalusia and Egypt, including the first generation of *fuqahāʾ* who joined Abū Ḥafṣ's battalion. Among the most prominent Islamic Cretan jurists of Andalusian origin were ʿUmar Ibn ʿĪsā Ibn Muḥammad Ibn Yūsuf Ibn Abī Ḥafṣ, al-Fatḥ Ibn al-ʿAlāʾ (the *qāḍī* of the Crete), Isḥāq Ibn Sālim, Mūsā Ibn ʿAbd al-Malik, Ismāʿīl Ibn Badr, his son Muḥammad, and his grandson Ismāʿīl Ibn Muḥammad, and the author of the *Kitāb Akriyat al-Sufun* Abū ʿAbd Allāh Muḥammad Ibn ʿUmar, a younger brother of the famous Mālikī scholar Yaḥyā Ibn ʿUmar (213–289/828–902), known as Ibn Abī al-Dawānīq, who was born and probably died on the island, but attended the law academies in Qayrawān and Egypt, collaborated with outstanding Mālikī scholars, and issued *responsa* dealing, *inter alia*, with commercial and shipping affairs.

[55] ʿAbd al-Raḥmān Ibn Khaldūn, *Kitāb al-ʿIbar wa-Dīwān al-Mubtadaʾ wal-Khabar fī Ayyām al-ʿArab wal-ʿAjam wal-Barbar* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1992), 1:266–270. It is worth-mentioning that the Islamic control over Sardinia and Cyprus was ephemeral.

of more advanced and permanent military bases were established along the northern shores of the Mediterranean at Fraxinetum in Provence, Monte Garigliano near Naples, and around Bari in Apulia. Navigation in the Adriatic Sea was threatened by independent Islamic flotillas, while the Syrian and Cretan Arabs, who sacked and captured Thessalonica in 904 and invaded several other strategic islands, threatened Byzantine navigation in the Aegean.[56]

Islamic ascendancy over vast expanses of Mediterranean shores, islands, and trunk routes could not have been accomplished, as Ibn Khaldūn (732–808/1332–1406) states, without employing the maritime experience of the subject populations:

> The royal and governmental authority of the Arabs became firmly established and powerful at that time. The non-Arab nations became

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[56] Aziz Ahmad, *A History of Islamic Sicily* (Edinburgh: Edinburgh University Press, 1975); Archibald Lewis and Timothy Runyan, *European Naval and Maritime History, 300–1500* (Bloomington: Indiana University Press, 1990), 41–47; Barbara M. Kreutz, *Before the Normans: Southern Italy in the Ninth and Tenth Centuries* (Philadelphia: University of Pennsylvania Press, 1991), 1–35; Elsayyed Sālem and Aḥmad ʿAbbādy, *Tārīkh al-Baḥriyya al-Islāmiyya fī al-Maghrib wal-Andalus* (Beirut: Dār al-Nahḍa al-ʿArabiyya, 1969), 65–119; Shakīb Arsalān, *Tārīkh Ghazawāt al-ʿArab fī Faransā wa-Swīsrā wa-Īṭālyā wa-Jazā'ir al-Baḥr al-Mutawassiṭ* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1933); John B. Bury, "The Naval Policy of the Roman Empire in Relation to the Western Provinces from the 7th to the 9th Century," *Centenario della Nascita di Michele Amari* (Palermo, 1910), 2:21–34; Hélène Ahrweiler, *Byzance et la mer: la marine de guerre, la politique et les institutions maritimes de byzance aux VII^{e}–XV^{e} siècles* (Paris, 1966), 92–135; Kenneth M. Setton, "On the Raids of the Moslems in the Aegean in the Ninth and Tenth Centuries," *American Journal of Archaeology* 58 (1954), 311–319; Alexander Kazhdan, "Some Questions Addressed to the Scholars Who Believe in the Authenticity of Kaminiates' 'Capture of Thessalonica'," *Byzantinische Zeitschrift* 71 (1978), 301–314; John H. Pryor, "Byzantium and the Sea: Byzantine Fleets and the History of the Empire in the Age of the Empire in the Age of the Macedonian Emperors, *C.* 900–1025 C.E.," in *War at Sea in the Middle Ages and the Renaissance*, ed. by John B. Hattendorf and Richard W. Unger (New York: The Boydell Press, 2003), 83–104; Christides, *Conquest of Crete*, 67–96; *idem*, "The Raids of the Moslems of Crete in the Aegean Sea: Piracy and Conquest," *Byzantion* 51 (1981), 76–111; Joshua Holo, "A Genizah Letter from Rhodes Evidently concerning the Byzantine Reconquest of Crete," *Journal of Near Eastern Studies* 59 (2000), 1–12; George C. Miles, "Byzantium and the Arabs: Relations in Crete and the Aegean Area," *Dumbarton Oaks Papers* 18 (1964), 1–32; Ernest W. Brooks, "The Arab Occupation of Crete," *English Historical Review* 28 (1913), 431–443; S.M. Imamuddin, "Cordovan Muslim Rule in Iqritish (Crete)," *Journal of the Pakistan Historical Society* 8 (1960), 297–312; Amīn T. Ṭībī, "Amāra ʿArabiyya Andalusiyya fī Jazīrat Iqrīṭish (Crete)," *Al-Muʾarrikh al-ʿArabī* 28 (1986), 45–55; Ibrāhīm A. al-ʿAdawī, "Iqrīṭish bayna al-Muslimīn wal-Bīzanṭiyyīn fī al-Qarn al-Tāsiʿ al-Mīlādī," *Al-Majalla al-Tārikhiyya al-Miṣriyya* 3 (1950), 53–68; Delgado, *El poder naval de Al-Andalus*, 99–110; John H. Pryor, *Geography, Technology, and War: Studies in the Maritime History of the Mediterranean 649–1571* (Cambridge: Cambridge University Press, 1992), 102–111; Letsios, *Das Seegesetz der Rhodier*, 62–68.

> servants of the Arabs and were under their control. Every craftsman offered them his best services. They employed seagoing nations for their maritime needs. Their own experience of the sea and of navigation grew, and they turned out to be very expert. . . .[57]

Arabic and Aphrodito papyri from the seventh and eighth centuries authenticate Ibn Khaldūn's observation and furnish us with much historical data about the establishment and organization of early Islamic fleets in the Mediterranean and Red seas.[58] A careful scrutiny of these official papyri reveals that the founders of early Islamic military fleets in the Mediterranean not only inherited and used former Byzantine maritime installations, but also adopted its naval administrative system, regulations and strategy.[59]

Islamic Admiralty and Maritime Laws and Practices

Islamic maritime achievements in the Mediterranean did not change the material culture of the occupied countries abruptly: instead there was cultural continuity in various aspects of life for centuries, despite gradual Arabization and Islamization processes. Non-Muslim subject populations retained their traditional legal institutions, including ecclesiastical and rabbinical tribunals,[60] whereas the jurisdiction of the

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[57] Ibn Khaldūn, *Muqaddima*, 1:266. An identical excerpt had been provided by Taqiyy al-Dīn Aḥmad Ibn ʿAlī al-Maqrīzī, *Al-Mawāʿiz wal-Iʿtibār fī Dhikr al-Khiṭaṭ wal-Āthār* (Cairo: Maktabat Madbūlī, 1998), 3:8–9.

[58] Aly M. Fahmy, *Muslim Naval Organisation in the Eastern Mediterranean from the Seventh to the Tenth Century A.D.* (Cairo: National Publication and Printing House, 1966), 1–9; Walter E. Crum, *Catalogue of the Coptic Manuscripts in the Collection of the John Rylands Library, Manchester* (Manchester: Manchester University Press, 1909), 158–159, 164; Frederic G. Kenyon *et al.*, *Greek Papyri in the British Museum: The Aphrodito Papyri* (Oxford: Oxford University Press, 1910), 4:6–7, 19–28, 59–67, 435–449; Arthur Hunt and C.C. Edgar, *Select Papyri* (London, 1932–1934), 2:593–601. The Aphrodito papyri shed light on (a) the construction, repair, and maintenance of ships; (b) disposition of the arsenals, fleets, and admiralty headquarters; and (c) recruitment of fighting men and seamen, their wages and allowances.

[59] Muḥammad Ibn Mankalī, *Al-Adilla al-Rasmiyya fī al-Taʿābī al-Ḥarbiyya*, ed. Maḥmūd Sh. Khaṭṭāb (Baghdād: Al-Majmaʿ al-ʿIlmī al-ʿIrāqī, 1988), 241–254.

[60] On pre-Islamic Jewish maritime law and practice consult: Stephen M. Passamaneck, "Two Aspects of Rabbinical Maritime Law," *The Journal of Jewish Studies* 22 (1971), 53–67; *idem*, "Traces of Rabbinical Maritime Law and Custom," *Revue d'Histoire du Droit* 34 (1966), 525–551; Raphael Patai, "Ancient Jewish Seafaring and Riverfaring Laws," in *By Study and also by Faith: Essays in Honor of Hugh W. Nibley*, ed. John M. Lundquist and Stephen D. Ricks (Salt Lake City: Desert Book Company, 1990), 389–416; Daniel Sperber, *Nautica Talmudica* (Leiden: E.J. Brill, 1986), 95–118.

qāḍī extended to Muslims and civil cases involving Muslims and non-Muslims.[61] Until the turn of the eighth century, Umayyād *qāḍī*s gave judgments according to their own discretion (*ra'y*/arbitrary or sound opinion of a judge), basing them on Qur'ānic regulations, prophetic traditions, and customary practices that did not contradict Islamic principles.[62] In many respects, Byzantine commercial and shipping laws and practices presumably remained valid even after the formation of Islamic law schools (*madhāhib*) during the second half of the eighth and first half of the ninth centuries. Remarkably, like the Romano-Byzantine legal system, Islamic judicial authorities never developed special admiralty courts. Rather the office of the *qāḍī*—occasionally advised and assisted by experts in maritime affairs and industry—adjudicated cases relating to maritime commerce and carriage by sea.

Additionally, like the sixth century Byzantine compilers of the Digest,[63] the founders of Islamic law schools and their fellow *'ulamā'* (jurists or doctors of law) subdivided their jurisprudential books into titles arranged and structured according to subject. For instance, the *Muwaṭṭa'* of Mālik Ibn Anas (97–179/715–795), *Mudawwana al-Kubrā* (lit. *The Great or Comprehensive Digest*) compiled by Saḥnūn Ibn Sa'īd al-Tanūkhī (160–240/776–854),[64] and *Kītāb al-Umm* of Muḥammad

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[61] The *qāḍī*'s jurisdiction extended beyond his regional domain and occasionally applied to alien and non-Muslim merchants regardless of their nationalities or denominations. Cases involving Muslim and non-Muslim parties were customarily adjudicated before Muslim *qāḍī*s; this principle has been maintained throughout the history of Islamic polities and legal institutions.

[62] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1993), 22–30; Robert S. Lopez, "Byzantine Law in the Seventh Century and Its Reception by the Germans and the Arabs," *Byzantion* 16 (1942–1943), 451.

[63] The Corpus Juris Civilis treats maritime cases and presents legal opinions of Roman lawyers in various parts of this collection and under different topics. The vast majority of maritime issues are dealt with in Digest IV, Digest V, Digest IX, Digest XIII, Digest XIV, Digest XIX, Digest XXI, Digest XXII, Digest XLI, Digest XLIV, Digest XLV, Digest XLVII and Digest L.

[64] It was Asad Ibn al-Furāt, the famous Aghlabīd fleet commander who landed on Sicily in 212/827, who drew up this digest, which consisted of questions proposed by him to Ibn al-Qāsim with their solutions by the latter. He then took them with him to Qayrawān, and Saḥnūn wrote them out under his dictation. It was originally called the *Asadiyya* (*i.e.*, after Asad Ibn al-Furāt), but as the questions were put down without any order in this first sketch, Saḥnūn drew them up under separate heads and augmented their number; besides, he resolved some by means of the traditions with which his memory was furnished when he learned by heart Ibn Wahb's edition of the *Muwaṭṭa'*. At any rate, the *Mudawwana* was originally compiled during the first quarter of the ninth century. See Abū al-'Abbās Shams al-Dīn

Ibn Idrīs al-Shāfiʿī (150–204/767–820) all thought to be among the oldest Islamic jurisprudential references in the Mediterranean territories, are topically arranged according to the Romano-Byzantine legal classification.[65] With the exception of notarial formulae and a few jurisprudential works,[66] none of the classical treatises on Islamic sacred law contain comprehensive chapters or subsections treating problems peculiar to maritime commerce, shipping, or naval industry: maritime problems are generally dispersed in chapters pertaining to hire, partnership, deposit, fixed punishments, almsgiving, pilgrimage, fasting, and prayer. An interesting exception, however, is the Kitāb Akriyat al-Sufun wal-Nizāʿ bayna Ahlihā (*Treatise concerning the Leasing of Ships and the Claims between (Contracting) Parties*), (henceforth "A. S.") which deals specifically with legal aspects of shipping and maritime commerce.[67]

Aḥmad Ibn Muḥammad Ibn Abī Bakr Ibn Khallikān, *Wafayyāt al-Aʿyān wa-Anbāʾ Abnāʾ al-Zamān* (Cairo: Maktabat al-Nahḍa, 1948), 2:352–353.

[65] Joseph Schacht, "Islamic Religious Law," in *The Legacy of Islam*, ed. Joseph Schacht and C.E. Bosworth (Oxford: Clarendon Press, 1974), 396–398.

[66] Al-Qāḍī ʿIyāḍ Ibn Mūsā al-Yaḥṣubī, *Madhāhib al-Ḥukkām fī Nawāzil al-Aḥkām* (Beirut: Dār al-Gharb al-Islāmī, 1990), 235–240, Chapter on Partnership, which deals exclusively with partnership in a vessel, jettison, contribution, salvage, and status of slaves, ship's servants and crew, and ordinary passengers on board. A great deal of Islamic notarial *formulae* consists of chapters and subtopics pertaining to the leasing of ships and hiring employees. See Aḥmad Ibn Muḥammad al-Ṭaḥāwī, *Kitāb al-Shurūṭ al-Ṣaghīr* (Baghdād, 1992), 1:265–267, 447; *idem, Kitāb al-Shurūṭ al-Kabīr*, ed. Jeanette A. Wakin (Albany, 1972), 106; ʿAlī Ibn Yaḥyā al-Jazīrī, *Al-Maqṣad al-Maḥmūd fī Talkhīṣ al-ʿUqūd* (Madrid: Consejo Superior de Investigaciones Cient(z.)ficas, 1998), 224–233; ʿAbd al-Wāḥid Ibn ʿAlī al-Tamīmī al-Marrākishī, *Wathāʾiq al-Murābiṭīn wal-Muwaḥḥidīn* (Cairo: Maktabat al-Thaqāfa al-Dīniyya, 1997), 469–472; Aḥmad Ibn Mughīth al-Ṭulayṭalī, *Al-Muqnaˣ fī ʿIlm al-Shurūṭ* (Madrid: Consejo Superior de Investigaciones Científica, Instituto de Cooperación con el Mundo Árabe, 1994), 242–244; Muḥammad Ibn Aḥmad al-Minhājī, *Jawāhir al-ʿUqūd wa-Muʿīn al-Quḍāt wal-Muwaqqiˣīn wal-Shuhūd* (Cairo, 1374/1955), 1:94–96, 293–294. The naval industry, construction of ships, and regulations against overloading are fairly well covered in manuals for market inspectors (*ḥisba*) and Islamic navigational literature. See Muḥammad Ibn Aḥmad Ibn ʿAbdūn al-Tujībī, *Seville musulmane au debut du XIIe siècle*, traduit avec une introduction et des notes par: E. Lévi-Provençal (Paris, 1947), 63–64; Abū ʿAbd Allāh Muḥammad Ibn Abī Muḥammad al-Saqaṭī, *Un manuel hispanique de ḥisba* (*Ādāb al-Ḥisba*), ed. G.S. Colin and E. Lévi-Provençal (Paris: E. Leroux, 1931), 71–72; Thami Azammouri, "Les Nawāzil d'Ibn Sahl, section relative à l'*Iḥtisāb*," *Hespéris Tamuda* 14 (1973), 40; Muḥammad Ibn Aḥmad Ibn Bassām al-Muḥtasib, *Nihāyat al-Rutba fī Ṭalab al-Ḥisba* (Baghdād: Maṭbaʿat al-Maʿārif, 1968), 148, 157; Muḥammad Ibn Muḥammad Ibn al-Ukhuwwa, *Maʿālim al-Qurbā fī Aḥkām al-Ḥisba* (Cairo: Al-Hayʾa al-Miṣriyya al-ʿĀmma lil-Kitāb, 1976), 324; Shihāb al-Dīn Aḥmad Ibn Mājid, *Kitāb al-Fawāʿid fī Uṣūl ʿIlm al-Baḥr wal-Qawāʿid* (Damascus, 1971), 29, 242.

[67] Manuscript nº 1.155 (2) of la Biblioteca del Real Monasterio de San Lorenzo

Written in the form of *responsa*, the core text of the treatise, as composed by the original author Muḥammad Ibn ʿUmar al-Kinānī al-Andalusī al-Iskandarānī (d. 310/923),[68] consists of only nine chapters. An appendix of six jurisprudential inquiries was apparently added later by the compiler Khalaf Ibn Abī Firās,[69] or a later Mālikī jurist. The first chapter deals with hiring seamen. Chapter Two treats

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de El Escorial, folios 41v. to 55r. The introductory passages of each chapter of the treatise were randomly published by ʿAbd al-Ḥafīẓ Manṣūr, "Al-Qānūn al-Baḥrī fī al-Fiqh al-Mālikī," in *Taṭawwur ʿUlūm al-Biḥār wa-Dawrihā fī al-Numuww al-Ḥaḍārī* (Sfax, 1976), 98–111. On page 101, Manṣūr writes: "I conclude my remarks by presenting samples from the original manuscript so that they may induce you and draw your attention to study such manuscripts that fill the archives (manuscript libraries) in Tūnis and abroad." The author apparently relies on another manuscript in one of the Tunisian manuscript libraries, although he does not provide its call number or precise location. The entire manuscript was published by Muṣṭafā A. Ṭāher, "*Kitāb Akriyat al-Sufun wal-Nizāʿ bayna Ahlihā*," *Cahiers de Tunisie* 31 (1983), 6–53. Although the editor's introduction cautiously examines the actual author of the treatise and provides us with short biographical notes of Mālikī jurists cited there, he fails to analyze the *dicta* and legal opinions, discover legal precedents, compare them with ones from earlier or later periods, or shed light on the influence of Byzantine maritime practice and law on their Islamic counterparts. A short review of Ṭāher's edition was published by Claude Cahen, "Un traite de droit commercial maritime du IV^{e}/X^{e} siecle Ifriqiyen," *Journal of the Economic and Social History of the Orient* 31 (1988), 304–305. Further analytical studies were published by José Aguilera Pleguezuelo, "El derecho mercantil mar(z.)timo en Al-Andalus," *Temas Arabes* 1 (1986), 93–106; *idem*, *Estudios de las normas e instituciones del derecho Islámico en Al-Andalus* (Seville: Guadalquivir Ediciones, 2000), 85–101; Udovitch, "Eleventh Century Islamic Treatise," 37–54; Christides, "Raid and Trade," 63–102; Delgado, *El poder naval de Al-Andalus*, 349–381; Maria A. Campoy, "Fuentes jurẓdicas," in *Al-Andalus y el mediterráneo* (Barcelona, 1995), 289–297. Moreover, the treatise was cited by Olivia R. Constable, "The Problem of Jettison in Medieval Mediterranean Maritime Law," *Journal of Medieval History* 20 (1994), 207–220; Deborah R. Noble, "The Principles of Islamic Maritime Law," (Ph.D. diss., University of London, 1988), 26–29; Letsios, "Sea Trade," 209–225.

[68] Abū ʿAbd Allāh Muḥammad Ibn ʿUmar Ibn Yūsuf Ibn ʿĀmir al-Kinānī al-Andalusī al-Iskandarānī died in Egypt on Thursday Shawwāl 3rd, 310 A.H., *i.e.*, 23rd of January 923 C.E. is a brother and disciple of the famous Mālikī jurist Yaḥyā Ibn ʿUmar, whose family came originally from al-Ḥā'in (Jaén). He was a jurist of the third *ṭabaqa*, joined Ibnʿ Abdūs and other famous jurists while in Qayrawān. Biographers hold controversial views as to Ibn ʿUmar's death place, either Qayrawān, or Crete, or Egypt. See Ṭāher (ed.), *op. cit.*, 10–11.

[69] Christides, "Raid and Trade," 65; Delgado, *El poder naval de Al-Andalus*, 349–352; Ṭāher (ed.), *op. cit.*, 6–7. He draws our attention to the fact that the treatise under discussion is attributed to Muḥammad Ibn ʿUmar, whereas Khalaf Ibn Abī Firās, a Mālikī jurist from Qayrawān with a bad reputation, who flourished between the years 330–359/941–969 and died there in 359/969, compiled it and added his own preface besides a few legal inquiries ascribed to Abū Muḥammad Ibn Abī Zayd, Abī Saʿīd Ibn Akhī Hishām, and ʿAbd al-Malik Ibn Isḥāq Ibn al-Tabbān. An anonymous scribe or notary copied the current form of the *Kitāb Akriyat al-Sufun* on the 23rd of Rajab, 724 A.H (16th June, 1324 C.E.).

the leasing of ships, forms of hire, and freight charges. Problems that may emerge between the contracting parties after concluding the charter agreement and that may prevent them from completing their transaction are discussed in the third chapter. The fourth chapter establishes the payment arrangements between the contracting parties if a technical malfunction in a ship should occur in the port of origin, *en route*, or after docking at the final destination. The fifth and longest chapter covers jettison, salvage, and contribution. Liability or otherwise of ship owners for what they carry is addressed in the sixth chapter. The author of the treatise devotes the seventh chapter to the procedures of loading and unloading goods. Partnership in a vessel is inadequately treated in the eighth chapter, and the ninth chapter refers to various sea-*commenda* and payment arrangements. Finally the appendix, whose legal inquiries date between the second half of the tenth and the first half of the eleventh century, concerns itself with the calculation of freight charges, overloading, ship owner's liability for the transport of specific goods to their destination, collision, jettison and general average. The A. S. is thus not precisely a collection of maritime laws that treats ownership and possession of ships, methods of acquisition, rights of co-owners, master-crew relations, etc., but rather a maritime treatise that treats mercantile and shipping matters exclusively.

"On the basis of a great deal of circumstantial evidence," Udovitch writes, "the text, as published by M. Ṭāher, can be confidently dated to the mid 11th century."[70] Our treatise in its present form, which certainly reflects the legal opinions of early Mālikī jurists, could indeed have been promulgated earlier than the first half of the eleventh century. With the exception of three [3] jurists, whose legal opinions are quoted in the treatise's appendix,[71] all twenty-seven [27] Mālikī *fuqahāʾ* (jurists) referred to in the A. S. lived between the eighth and the first three decades of the tenth centuries.[72] Regardless of the exact date, the promulgation of this commercial treatise coin-

[70] Udovitch, "Eleventh Century Islamic Treatise," 38, f. 4.

[71] Abū ʿAbd Allāh Ibn ʿĪsā al-Miṣrī known as Ibn Abī Zamanīn (324–399/936–1008), Abū ʿUmar Aḥmad Ibn ʿAbd al-Malik known as Ibn al-Mukwī (324–401/936–1010), and Abū ʿImrān Mūsā Ibn ʿĪsā Ibn Abī al-Ḥājj al-Fāsī al-Qayrawānī (368–430/979–1039). Note that their enactments are cited in the appendix rather than the core text.

[72] Cahen, "Droit commercial maritime," 304; Delgado, *El poder naval de Al-Andalus*, 354; Noble, "Principles of Islamic Maritime Law," 27.

cided with the Islamic *imperium* over the Mediterranean and the capture of Sicily and Crete—two strategic islands and key ports of call between the East and the West, the Muslim and the Christian worlds. From that time, for three centuries, Muslim and *dhimmī* merchants expanded their overseas trade in the eastern and western Mediterranean consistent with Islamic naval supremacy and tolerant Muslim regimes. Despite the substantial legal data available in this unique treatise, it does not enable economic historians to formulate a global view of Christian-Islamic maritime commerce in the Mediterranean region. Nor does it cover the entire Islamic Mediterranean geographically: confined as it is to the major ports of Egypt, Ifrīqiya, Sicily, and Andalusia, while the Moroccan, Syro-Palestinian, and Cretan ports are not mentioned at all.

Purposes and Methodology of the Study

Despite the lack of conclusive evidence dating the precise period when the N. N. was promulgated, this collection was unquestionably recognized in Byzantine provinces on the eastern coasts of the Mediterranean, Aegean, Marmora, and Black seas from the eighth through the tenth centuries, during which time Islamic prominence was discernible in the Mediterranean and Aegean. In the reign of Leo VI, the N. N. appeared as an appendix in the first editions of the Basilika.[73] The N. N. may have been incorporated into Book LIII of the Basilika for either or both of the following reasons: First, the treatise in question may have been the most comprehensive, irreplaceable treatise for several centuries because it covered both civil and criminal procedures. Second, as some scholars argue, Byzantine maritime trade did not recover after the Islamic military expansions in the Mediterranean arena. Byzantine maritime law could not have evolved then, lacking the expansion of the overseas trade.[74]

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[73] *Basilicorum*, ed. by H.J. Scheltema and N. van Der Wal (Groningen: Martinus Nijhoff, 1974), *Book LIII*, 7:2464–2479; Pardessus, *Lois maritimes*, 1:222, 226–227; Azuni, *Maritime Law of Europe*, 1:321–324; Ashburner, *op. cit.*, cxi; John. E. Dotson, "Freight Rates and Shipping Practices in the Medieval Mediterranean," (Ph.D. diss. The Johns Hopkins University, 1969), 11–12; Atikson, "Rome and the 'Rhodian Sea-Law'," 93–94. For further details on the reception of the Rhodian maritime law into the Basilika, consult Letsios, *Das Seegesetz der Rhodier*, 223–235.

[74] Schomberg, *Laws of Rhodes*, 375; Letsios, *Das Seegesetz der Rhodier*, 62–63, 217–218; Vasiliev, *History of the Byzantine Empire*, 1:249; Henri Pirenne, *Medieval Cities: Their*

So far, only two Mediterranean maritime treatises have come down to us from the period between the seventh and tenth centuries: the N. N. and A. S. Although innumerable Byzantinists have studied the evolution of the N. N., only one scholar has tentatively attempted to discuss the relationship with its Islamic counterpart at the time when more than half the maritime possessions in the Mediterranean were under Caliphate rule.[75] The discovery of the A. S. may also disclose unresolved issues in maritime legal history. It may clarify whether or not Muslim jurists maintained Byzantine maritime customs in the former Byzantine territories. If they did, what articles of the N. N. and the Digest were then incorporated or dismissed by Muslim jurists, and why? What did Muslim jurists introduce? Were there two distinct admiralty jurisdictions, Byzantine and Islamic, in the Mediterranean world?

The purpose of the present study is not to give a systematic account of all that has been written on the maritime law of Rhodes, nor give an exegesis of all the texts that have been brought to bear on it. Instead, its purpose is to compare the statutes recorded in the Digest and N. N., on the one hand, and then compare them with the *responsa* established in the A. S. and early Islamic jurisprudence from the Mediterranean, on the other.[76] It deals in particular with

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Origins and Revival of Trade (Princeton: Princeton University Press, 1974), 26–55. It is worth-mentioning that the emergence of the Arabs in the Mediterranean arena did not have catastrophic consequences for the maritime trade of Byzantium. On the contrary, despite the Islamic expansion at sea and the subsequent conquest of Sicily and Crete in 212/827, diplomatic and commercial relationships were maintained between the Christian and Muslim worlds. Our hypothesis is supported by documentary and archeological evidence. See Lewis, *Naval Power and Trade*, 132–161; Robert S. Lopez, "The Role of Trade in the Economic Readjustment of Byzantium in the Seventh Century," *Dumbarton Oaks Papers* 13 (1959), 69–85; Eduardo M. Moreno, "Byzantium and al-Andalus in the Ninth Century," in *Byzantium in the Ninth Century: Dead or Alive*, ed. Leslie Brubaker (Aldershot, 1998), 215–227; Francesco Gabrieli, "Greeks and Arabs in the Central Mediterranean Area," *Dumbarton Oaks Papers* 18 (1964), 59–65; *idem*, "Islam in the Mediterranean World," in *The Legacy of Islam*, ed. Joseph Schacht and C.E. Bosworth (Oxford: Clarendon Press, 1974), 63–104; F. H. van Doorninck, "The Medieval Shipwreck at Serçe Limani: An Early 11th-Century Fatimid-Byzantine Commercial Voyage," *Graeco-Arabica* 4 (1991), 45–52.

[75] Christides, "Raid and Trade," 61–102.

[76] No attempt will be made to portray the legal differences among Islamic law schools for the subject has been treated by Noble, "Principles of Islamic Maritime Law"; Khalilieh, *Islamic Maritime Law*; Muṣṭafā M. Rajab, *Al-Qānūn al-Baḥrī al-Islāmī ka-Maṣdar li-Qawāʿid al-Qānūn al-Baḥrī al-Muʿāṣir* (Alexandria: Al-Maktab al-ʿArabī al-Ḥadīth, 1990); ʿAbd al-Raḥmān Ibn Aḥmad Ibn Fāyiʿ, *Aḥkām al-Baḥr fī al-Fiqh al-Islāmī* (Jedda: Dār al-Andalus al-Khaḍrāʾ, 2000).

the evolution of maritime law in the Mediterranean Sea between 800 and the 1050s, a period in maritime legal history whose gaps contemporary scholars have not attempted to bridge. It is my hope that the outcomes of the present study will allow scholars a further appreciation of the contribution Islamic jurisprudence made to the development and internationalization of the law of the sea prior to the emergence of the Italian commercial empires.

The study consists of seven chapters. Chapter one deals with the physical and legal significance of the ship, with emphasis on the methods employed to compute ship capacity and the importance of naming commercial vessels. Chapter two examines issues pertaining to the ownership and possession of a vessel, the employment of crew—their duties, rights, and payment—and the legal status of passengers. Carriage of cargo by sea, forms of contracts, liability of the lessor, shipping fees and the factors affecting them and the circumstances justifying breach of contract are covered in chapter three. Jettison, average and contribution are treated in chapter four. Chapter five describes Byzantine and Islamic laws of collision followed by the rules governing the salvage of jetsam, which are surveyed in chapter six. The final chapter concludes the study by explaining the legal differences between Byzantine maritime loan and *chreokoinōnia vis-à-vis* Islamic *commenda.* An English translation of the A. S. based on Ṭāher's transcription and Ashburner's English edition and translation of the Rhodian Sea Law are appended to our study. The aim here is to: (a) cover issues not raised in the study's seven chapters; (b) enable lawyers and legal historians to examine further the relationship between early Byzantine and Islamic maritime laws with their medieval European sea laws. Since Ṭāher's Arabic edition of the A. S. is too tentative and lacks legal analysis, the present English edition contains extensive biographical notes and comparable *responsa* from earlier and later Mālikī and non-Mālikī jurisprudential sources.

As for the methodological and discussion format, where the material overlaps in both bodies of law, they are all put together so that a reader may have to refer to footnotes to find out the sources. However, when differences in legal opinions emerge, or Muslim jurists issued unprecedented *responsa* and laws that are not found in Roman and Byzantine legal codices, the discussion entails separation. By adopting such a methodological format, it enables the readers to trace the similarities and differences between both distinct legal systems around the Middle Sea. In order to show how theoretical aspects

of Islamic and Byzantine maritime laws were practiced, first-hand papyri and Geniza evidence, *ḥisba* manuals, historical accounts, and modern publications will be utilized as well.

An axiom ascribed to ʿUmar Ibn al-Khaṭṭāb (13–23/634–644), the second caliph in Islam, states: "May God have mercy on a person who acknowledges his/her own limitation and pauses at it [*raḥima Allāhu imriʾin ʿarafa ḥadduhu fa-waqafa ʿindahu*]." My linguistic limitations do not permit me to use primary Latin and Greek legal codices. As a result, my analysis of the Roman and Byzantine laws of the sea will depend primarily on modern monographs and translations of Ashburner,[77] Dareste,[78] Freshfield,[79] Justice,[80] and Letsios,[81] with the hope that the linguistic deficiencies will not affect the actual thesis of this study.[82] Although Ashburner's edition was published a century ago, Byzantinists and legal historians still consider it the most comprehensive analytical study ever written on the N. N., covering its relations to the Roman and Medieval European maritime laws and practices.[83] Nevertheless, except for appendices A, D and E, which were published by Ashburner and Justice, Letsios relies on the forty-seven Rhodian codes integrated in the Basilika. Dareste and Freshfield, however, use a different manuscript that lacks of Articles III:32 and III:37 as well as appendices A, D and E.

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[77] Walter Ashburner, *The Rhodian Sea Law* (Oxford: Clarendon Press, 1909).

[78] Rodolphe Dareste, "La *Lex Rhodia*," *Revue de Philologie* 29 (1905), 1–29.

[79] Edwin H. Freshfield, *A Manual of Later Roman Law: The Ecloga* (Cambridge: Cambridge University Press, 1927), 56–68, 195–207.

[80] Justice Alexander, *A General Treatise of the Dominion of the Sea* (London, 1724), 76–116.

[81] Dimitrios G. Letsios, *Das Seegesetz der Rhodier: Untersuchungen zu Seerecht und Handelsschiffahrt in Byzanz* (Rhodos: Institouto Aigaiou tou Dikaiou tes Thalassas kai tou Nautikou Diakiou, 1996).

[82] Once again, the goal is not to give a systematic account of all that has been written on the maritime law of Rhodes, nor give an exegesis of all the texts that have been brought to bear on it.

[83] Letsios, *Das Seegesetz der Rhodier*, 245.

CHAPTER ONE

PHYSICAL AND LEGAL SIGNIFICANCE OF VESSEL

Definition of a "Ship"

A definition of a ship appears in the *Qur'ān* (54:13): "But We (God) bore him (Noah) on an (Ark) made of broad planks and caulked with palm-fiber."[1] The Roman legist Ulpianus defines the term *ship* as "vessels and even rafts, employed for navigating the sea, rivers, or lakes."[2] Based on both definitions, a ship is any conveyance plying navigable inland waters, along the coasts, or the high seas—including skiffs, or small boats (*i.e.*, service, fishing or lifeboats), galleys, military or merchant ships, whether propelled by oars, sails or both, regardless of type, purpose, and capacity. A ship is thus not necessarily a nautical vessel engaged in commerce: rather the term includes all types of warships. Defining a *ship* is essential for the assertion of liability for her unseaworthiness, and for assessing general average contributions and salvage awards.

When a group of shippers leased a vessel for a trading voyage, the contracting parties had to ensure that she was technically fit, carried adequate nautical instruments and tackle, and could safely ply navigable inland waters and the high seas. A typical seagoing merchant vessel had to carry many anchors, appropriate hawsers and ropes, canvas and/or cotton sails, masts, oars, rudders and gangways for embarking and debarking,[3] in addition to nautical instruments.

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[1] The *Qur'ān* counts the ship among the *āyāt* (miracles) of God and 28 verses enumerate her benefits to mankind: 23 verses contain the word *fulk*, *safīna* occurs 4 times in 3 verses, *juwār* is used in two verses, *jāriya* in one verse, and "*dhāt alwāḥ wa-dusur*" meaning "made of planks and nails" as well in one verse. Sayyed S. Nadavi, "Arab Navigation," *Islamic Culture* 15/4 (1941), 436, 442–444; Ilse Lichtenstadter, "Origin and Interpretation of some Qur'ānic Symbols," in *Studi Orientalistici in Onore di Giorgio Levi Della Vida* (Roma: Instituto per l'Orient, 1956), 2:70–77.

[2] Samuel P. Scott, *The Civil Law* (Cincinnati: The Central Trust Company, 1932), 4:201, Digest XIV, 1, 1, 6.

[3] *Ibid.*, 5:195, Digest XXI, 2, 2, 44: "Everything which is attached to a ship, as, for instance, the rudder, the mast, the yards and the sails, are, as it were, the members of the ship"; Ashburner, *Rhodian Sea-Law*, 80 Article III:2; 90–91, Article III:11;

Oversized vessels required service boats on board to transport goods to the quayside.[4] Identical rules applied to ship sale and purchase contracts. Both parties had to specify the vessel's tackle and navigational instruments in the bill of sale.[5] Similarly, Islamic notarial formulae for sale and leasing contracts from the ninth century onwards obliged the parties to indicate the ship's type, capacity, technical structure: her length and breadth, rigging, and essential nautical instruments.[6] Neither Byzantine nor Islamic laws bound ship owners

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Letsios, *Das Seegesetz der Rhodier*, 258, 260; McCormick, *Origins of the European Economy*, 410. A third century long-term leasing contract on a papyrus vividly recounts the required gear and instruments of a seagoing vessel. The vessel was chartered with "mast, yard, linen sail, ropes, jars, rings, blocks, two steering oars with tiller bars and brackets, four oars, five boat poles tipped with iron, companionway ladder, landing plank, winch, two iron anchors with iron stocks, one one-armed anchor, ropes of palm fiber, tow rope, mooring lines, three grain chutes, one measure, one balance yard, Cilician cloth, cup-shaped two-oared skiff fitted with all appropriate gear and an iron spike." See Hunt and Edgar, *Select Papyri*, 1:113–117, P. Lond. 1164; Lionel Casson, *Ships and Seamanship in the Ancient World* (Baltimore: The Johns Hopkins University Press, 1995), 257–258.

[4] Evidently not all ports had docks or quays in the seventh to the tenth century. In the Christian world of northern Europe quays began to be built at the end of the tenth century for the first time since the end of Roman rule. However, port facilities in Mediterranean port-cities were much more developed and adapted to harbor larger vessels. All Islamic port-cities mentioned in the A. S., including inland ones such as Fusṭāṭ and Seville, proved to have artificial docks or quays. Likewise, major coastal Byzantine cities like Constantinople and Thessalonike were equipped with quays. Nevertheless, most stopovers and ports were merely unimproved natural roadsteads and loading and unloading was by ships' boats. On the history of European quaysides in medieval period see Richard W. Unger, *The Ship in the Medieval Economy 600–1600* (Montreal: McGill-Queen's University Press, 1980), 64, 94–95, 109–110, 146–148.

[5] Bezalel Porten *et al.*, *The Elephantine Papyri in English: Three Millenia of Cross-Cultural Continuity and Change* (Leiden: E.J. Brill, 1996), 486–490, P. Lond. V 1726; Arthur Hunt, *The Oxyrhynchus Papyri* (London: Egypt Exploration Fund, 1927), 17:250–253, Oxy. 2136; Hunt and Edgar, *Select Papyri*, 1:113–117, P. Lond. 1164; H.I. Bell, *Greek Papyri in the British Museum* (London, 1917), 5:178–179, Pap. 1726.

[6] Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:447; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Minhājī, *Jawāhir al-ʿUqūd*, 1:94–96, 293–294; Shihāb al-Dīn Abū al-ʿAbbās Ibn Idrīs al-Qarāfī, *Al-Dhakīra* (Beirut: Dār al-Gharb al-Islāmı, 1994), 1:355; Abū Muḥammad ʿAbd Allāh Ibn Salmūn, *Al-ʿIqd al-Munzzam lil-Ḥukkām fi-mā Yajrī bayna Aydīhim min al-ʿUqūd wal-Aḥkām* (Beirut, ?), 2:4–5; Abū al-Qāsim Ibn Aḥmad al-Burzulī, *Fatāwā al-Burzulī: Jāmiʿ Masā'il al-Aḥkām li-mā Nazala min al-Qaḍāyā bil-Muftīn wal-Ḥukkām* (Beirut: Dār al-Gharb al-Islāmī, 2002), 3:87–89, 659; Ṭāher (ed.), *Akriyat al-Sufun*, 52; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 432; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 66. The reference to portulans and itineraries of mariners reported to come from the Jerusalemite geographer al-Muqaddasī (336–380/947–990), where he uses the term *ṣūrah* to denote chart. See Abū ʿAbd Allāh Muḥammad Ibn Aḥmad al-Muqaddasī, *Aḥsan al-Taqāsīm fi Maʿrifat al-Aqālīm* (Leiden: E.J. Brill, 1906), 95; William C. Brice, "Early Muslim Sea-Charts," *Journal of the Royal Asiatic Society of Great Britain and Irland* (1977),

to outfit sea-going carriers with lifeboats, although written documents show that oversized and large ships carried or towed behind them small boats that could function as service conveyances or as lifeboats.[7] On the basis of this information, one may infer that a merchant ship could not be hired out without her basic rigging and nautical instruments.[8]

The N. N. uses the word *ploion*,[9] corresponding to the Latin *navis*,[10] to denote a ship/boat used for the conveyance of goods and/or passengers. Unlike the galley, a long ship used for military purposes and propelled mainly by oars, the *ploion* was a rounded vessel propelled

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53–61; *idem*, "Compasses, Compassi and Kanābīṣ," *Journal of Semitic Studies* 29/1 (1984), 169–178; Maurice Lombard, "Une carte de bois dans la Méditerranée musulmane (VII^{e}–XI^{e} siècle)," *Annales Economies Sociétés Civilisations* 14 (1959), 234–254; Gerald R. Tibbetts, "The Role of Charts in Islamic Navigation in the Indian Ocean," in *History of Cartography*, *II: Cartography in the Traditional Islamic and South Asian Societies*, ed. by J.B. Harley and David Woodward (Chicago: The University of Chicago Press, 1992), 256–262; Ahamd Y. al-Hassan and Donald R. Hill, *Islamic Technology and Illustrated History* (Cambridge: Cambridge University Press, 1992), 128; Shelomo D. Goitein, "Portrait of a Medieval India Trader: Three Letters from the Cairo Geniza" *Bulletin of the School of Oriental and African Studies* 50 (1987), 460, TS AS 156.238, ll. 5–13: ". . . but the captain had a stroke and died. We threw his body overboard into the sea. So the boat remained without a commander and a . . ., and we had no charts."

[7] Scott, *op. cit.*, 5:195, Digest XXI, 2, 2, 44: "It is held that a boat is no part of a ship and has no connection with it, for a boat is itself a little vessel . . ."; Ashburner, *op. cit.*, 80 Article III:2; 90–91 Article III:11; 118 Article III:46; Letsios, *Das Seegesetz der Rhodier*, 95–96, 97–99, 260, 266; Cecil Torr, *Ancient Ships* (Chicago: Argonaut Publication, Inc.: 1964), 103–104; Ṭāher (ed.), *op. cit.*, 52; Khalilieh, *Islamic Maritime Law*, 33–35; McCormick, *Origins of the European Economy*, 408–409; John H. Pryor and Sergio Bellabarba, "The Medieval Muslim Ships of the Pisan *Bacini*," *The Mariner's Mirror* 76 (1990), 106–108.

[8] It was apparently a common pan-Mediterranean practice to equip commercial vessels with appropriate rigging before they were launched and commissioned for sailing. Jewish *halacha* sources from the Talmudic and Gaonate periods corroborate this hypothesis. See Moses Maimonides, *The Code of Maimonides (Mishneh Torah)* (New Haven: Yale University Press, 1951), 5:11–12, 96; Passamaneck, "Two Aspects of Rabbinical Maritime Law," 55; *idem*, "Traces of Rabbinical Maritime Law and Custom," 529–535; *idem*, *The Traditional Jewish Law of Sale: Shulhan Arukh Hoshen Mishpat* (Cincinnati: Hebrew Union College, 1983), 99–100; Patai, "Ancient Jewish Seafaring and River-faring Laws," 390.

[9] The general meaning of *ploion* is a ship or a boat. Nonetheless, Casson mentions several types of *ploion* used for various purposes in accordance with their actual capacity. The *ploion zeugmatikon* "yoked boat" apparently a catamaran (a boat with twin hulls) is a small boat with a capacity of 9 to 12.5 tons. Another type called *ploion Hellenikon*, *i.e.* "Greek boat" may designate a vessel built in the standard Greek style as opposed the native Egyptian. See Lionel Casson, *Ships and Seamanship in the Ancient World* (Baltimore: Johns Hopkins University Press, 1995), 334, 340.

[10] Dotson, "Freight Rates and Shipping Practices," 96–97.

mainly by sails and used to transport cargo.[11] Length to beam ratios were usually 3:1 or 4:1, with a shallow keel and rounded hull suitable for sailing on the high seas and along the coastline.[12] The wide beam length ratio provided maximum cargo storage space. Byzantine commercial fleets consisted of different types of *ploia* transporting passengers and cargo such as the *akatos, keles, lembus, kerkourus, kybaia*, and *phaselus*.[13] Certain types of these vessels, as the seventh and eighth centuries Egyptian papyri prove, were in service of early Islamic Mediterranean navies.[14]

The generic Arabic words for ship that appear constantly in the A. S. are *markab* (lit. a conveyance or riding vessel), *safīna*,[15] and *lawḥ* (lit. a board or plank of wood). Semantically, the *markab* refers to ships propelled either by oars or sails, which navigated the high seas, coasts and inland waters. A *safīna* could be larger than a *markab* and was propelled exclusively by sail.[16] As the A. S. treatise refers to them on equal footing, possibly some variations are more linguistic than physical. Professional seamen and experienced sea travelers of this period could appreciate the actual sailing characteristics of each type of vessel.[17] The *markab* and *safīna*, mentioned interchangeably

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[11] Ashburner, *op. cit.*, clii, 63; Letsios, *Das Seegesetz der Rhodier*, 83.

[12] Frederick van Doornick, "Byzantium, Mistress of the Sea: 330–641," in *A History of Seafaring Based on Underwater Archaeology*, ed. George F. Bass (London: Thames and Hudson, 1972), 139–144; George Makris, "Ships," in *The Economic History of Byzantium from the Seventh through the Fifteenth Century*, ed. Angeliki E. Laiou *et al.* (Washington, D.C.: Dumbarton Oaks Research Library and Collection, 2002), 1:97; Torr, *Ancient Ships*, 24–25.

[13] Casson, *Ships and Seamanship*, 157–168; Torr, *Ancient Ships*, 105–124; Scott, *op. cit.*, 4:202, Digest XIV, 1, 1, 12, refers to ships designed to carry passengers only or certain type(s) of merchandise and sail particular waters. On the structural design, types, and duration and average speed in knots of Byzantine merchantmen, see John H. Pryor, "Types of Ships and their Performance Capabilities," in *Travel in the Byzantine World*, ed. by Ruth Macrides (London: Variorum Prints, 2002), 33–58; Michael McCormick, *Origins of the European Economy: Communications and Commerce A.D. 300–900* (Cambridge: Cambridge University Press, 2001), 404–410.

[14] Fahmy, *Muslim Naval Organisation*, 37, 125–137.

[15] On the semantic origin of the term *s.f.n.* or *s.p.n.* and its incorporation into Arabic, consult H. Kindermann, "*Safīna*," *The Encyclopaedia of Islam* (Leiden: E.J. Brill, 1995), 8:808–809.

[16] Terms for ships varied with place and time. For example, the term for a large sailing vessel in one port may signify a small nautical vessel in another. An Islamic *shīnī* or *dromon* of the seventh century does not necessarily signify the same size, structure and design as it does in later periods.

[17] Khalilieh, *Islamic Maritime Law*, 23–24.

in the A. S., might be parallel Arabic terms for the Greek *ploion* of the N. N.[18]

Capacity and Overloading Regulations

When signing a contract to lease a specific cargo ship, shippers were most concerned with her seaworthiness, as well as other considerations

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[18] The naval architecture, construction, and types of Byzantine and Islamic ships during the seventh and tenth centuries is beyond the scope of the current study. However, among the useful bibliographical references are: Ahrweiler, *Byzance et la mer*, 408–439; Letsios, *Das Seegesetz der Rhodier*, 88; Pryor, *Geography, Technology, and War*, 25–39; R.H. Dolley, "The Rig of Early Medieval Warships," *The Mariner's Mirror* 35/1 (1949), 51–55; *idem*, "The Warships of the Later Roman Empire," *The Journal of Roman Studies* 38 (1948), 47–53; George Bass *et al.*, *Yassi Ada: Volume I: A Seventh Century Byzantine Shipwreck* (Texas: College Station, 1982); George Bass, Frederic H. van Doornick, "An 11th Century Serçe Liman, Turkey," *The International Journal of Nautical Archaeology and Underwater Exploration* 7/2 (1978), 119–132; J. Richard Steffy, "The Reconstruction of the 11th Century Serçe Liman Vessel: A Preliminary Report," *The International Journal of Nautical Archaeology* 11/1 (1982), 13–34; H.S. Khalilieh, "The Enigma of Tantura B: Historical Documentation and the Lack of Circumstantial Documentary Evidence," *International Journal of Nautical Archaeology* 34/2 (2005), 314–322; Yaakov Kahanov, "The Tantura B Shipwreck: Preliminary Hull Construction Report," In *Down the River to the Sea*, ed. Jerzy Litwin (Gdansk: Polish Maritime Museum, 2000), 151–154; M.J.P. Joncheray, "Le navire de Bataiguire," *Archeologia* 85 (1975), 42–48; Lionel Casson, *Ships and Seafaring in Ancient Times* (London: British Museum Press, 1994), 96–126; Vassilios Christides, "Two Parallel Naval Guides of the Tenth-Century—Qudama's Document and Leo VI's Naumachica: A Study on Byzantine and Moslem Naval Preparedness," *Graeco-Arabica* 1 (1982), 51–103; *idem*, *Conquest of Crete*, 42–50; *idem*, "Byzantine Dromon and Arab Shīnī: The Development of the Average Byzantine and Arab Warships and the Problem of the Number and Function of the Oarsmen," *Tropis* 3 (1995), 111–122; Barbara M. Kreutz, "Ships, Shipping and the Implications of Change in the Early Medieval Mediterranean," *Viator* 7 (1976), 79–109; Shelomo D. Goitein, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza* (Berkeley: University of California Press, 1967), 1:309–313; Ṣabīḥ ʿAodeh, "Types of Vessels and their Ownership as Seen in the Cairo Geniza Documents," in *Mas'at Moshe: Studies in Jewish and Islamic Culture Presented to Moshe Gil* ed. Ezra Fleischer *et al.* (Jerusalem: Bialik Institute, 1998) (Hebrew), 282–297; Fahmy, *Muslim Naval Organisation*, 115–137; Delgado, *El poder naval de Al-Andalus*, 302–313; Jalāl ʿAbd al-Ghanī, "The Sea Environment and Arab Navigation in the Classical Andalusian Poetry during the Periods of Petty Emirates (*Mulūk al-Ṭawā'if*) and Almohads (403–667/1012–1268)" (Unpublished M.A. thesis, Department of Arabic Language and Literature, University of Haifa, 2002), 82–106; Hans Kindermann, *Schiff im Arabischen, Untersuchung über Vorkommen und Bedeutung der Termini* (Bonn, 1934) for the Arabic translation see *Muṣṭalaḥ al-Safīna ʿind al-ʿArab*, trans. by N.A. Muṣṭafā (Abū Dhabī, 2002); Darwīsh al-Nukhaylī, *Al-Sufun al-Islāmiyya ʿalā Ḥurūf al-Muʿjam* (Alexandria: Alexandria University Press, 1974). In time, however, Muslims became highly skilled and made significant advances, particularly in nautical science. They introduced the

such as the freight tariff. Seaworthiness was associated with the equipment, and the size and proficiency of the crew. The former category meant that the design, structure, condition, and equipment of the ship had to be suitable for carrying goods of a particular kind safely to their destination, *i.e.*, technically suited to encounter the ordinary perils of the voyage. As for the crew, the lessor was required to recruit a competent master and professional complement. A ship manned by unskilled mariners would certainly be regarded as unseaworthy. Thus, it is not surprising to observe that Roman, Byzantine, and Islamic laws required the contracting parties to name the seamen designated to operate the vessel.[19] Knowing precisely who the crews were could help lessees assess their professional ability and conduct.

Calculating a ship's capacity is a maritime practice originating in the biblical period.[20] Early mariners, port authorities, and other public bodies used various units to indicate a ship's capacity.[21] Classical Greeks computed a ship's capacity in *talents*, the Egyptians calculated her in *artabs*, while the Romans used the *amphora* in the third century C.E., later replaced by the *modius* in Byzantium.[22] Similarly mer-

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lateen rig and astronomical instruments, such as the compass, astrolabe, and *kamāl*, to the Mediterranean world. See Marina Tolmacheva, "On the Arab System of Nautical Orientation," *Arabica* 27 (1980), 181–192; H.P.J. Renaud, "Sur une tablette d'astrolabe appartenant à M.H. Terrasse," *Hespéris* 26 (1939), 157–169; David Nicole, "Shipping in Islamic Art: Seventh through Sixteenth Century A.D.," *The American Neptune* 49 (1989), 168–197; Christos G. Makrypoulias, "Muslim Ships through Byzantine Eyes," in *Aspects of Arab Seafaring: An Attempt to fill in the Gaps on Maritime History*, ed. Yacoub Y. al-Hijji and Vassilios Christides (Athens, 2002), 179–190.

[19] Scott, *op. cit.*, 3:134, Digest IV, 9, 1, 2; 10:286, Digest XLVII, 5, 1, 1; Ashburner, *op. cit.*, 121, Appendix D:III; Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:447; Minhājī, *Jawāhir al-ʿUqūd*, 1:293–294; Ibn Salmūn, *Al-ʿIqd al-Munzzam*, 2:4–5; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 432.

[20] Driver and Miles, *Babylonian Laws*, 1:427–428; 2: 83–85.

[21] Herman T. Wallinga, "The Unit of Capacity for Ancient Ships," *Mnemosyne Bibliotheca Classica Batava* 17 (1964), 2–6.

[22] Vélissaropoulos, *Les Nauclères Grecs*, 61–64; Scott, *op. cit.*, 4:212, Digest XIV, 2, 10, 2; Ashburner, *op. cit.*, cliii; Letsios, *Das Seegesetz der Rhodier*, 86–88; Wallinga, "Unit of Capacity," 8–10; Casson, *Ships and Seamanship*, 183–190. Wallinga and Casson have covered all aspects of this subject thoroughly, so it would be superfluous to reiterate their findings. Concerning the *modius*, there were various kinds of *modii* in Byzantium. The sea (*thalassios*) or imperial (*basilikos*) *modius* equaled 40 *logarrikai litrai*, or 17.084 liters; the monastic (*monasteriakos*) *modius*, 32 *logarikai litrai*, or 13.667 liters; the revenue (*annonikos*) *modius*, 26.667 *logarikai litrai*, or 11.389 liters. See Kazhdan *et al.*, *Oxford Dictionary of Byzantium*, 2:1388. As the *talent* and the *amphora*, each represented a cubic foot of water, and a Greek or Roman foot measured about 97 of the English foot, the *talent* and the *amphora* each weighed very nearly 57 lbs (25.82 kg.). See Torr, *Ancient Ships*, 25.

chantmen of classical Islam were rated in *irdabb*,[23] quantity of particular commodities, or total number of passengers and animals.[24] The Mediterranean world never had a uniform system of calculating a ship's capacity,[25] as each country and territory maintained its own system of weights and measures. Hence the owner and captain of a ship sailing to a foreign destination had to convert the weight units of that particular location into the corresponding official measure of their homeport to avoid overloading and to collect appropriate freight charges.

An entrepreneur who sought to invest in the shipping business or to acquire ships had, first of all, to decide whether the vessels were to sail on inland waters or along the coasts and high seas. In addition, he had to verify that they were economically and technically seaworthy with regard to sailing to foreign ports.[26] Scævola, a second century Roman legist, stated the ideal size of a normal seaworthy vessel.[27] Ships of 10,000 sea *modii* (450 cubic meters/68 tons

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[23] *Irdabb* (*artab*) Originally a Persian dry measure of capacity used in Egypt under the Ptolemies and the Byzantines, equal to 72.3 kg. of wheat. In the Mamlūk period, the *irdabb* of Cairo corresponded to 68.8 kg. of wheat, whereas the *irdabb* of Alexandria contained 82.3 kg. of wheat.

[24] Jaser Abu Safieh, *Bardiyyāt Qurra Ibn Sharīk al-ʿAbsī* (Riad: Markiz al-Malik Faiṣal lil-Buḥūth wal-Dirāsāt al-Islāmiyya, 2004), 257, Papyrus 1351; Bell, *Greek Papyri*, 225–26; Khalilieh, *Islamic Maritime Law*, 31. Eleventh century Geniza records suggest that the average capacity of trans-Mediterranean commercial ships was 400–500 passengers. Nonetheless, Bernard the Wise reports in 870 of an oversized Islamic military ship carrying 3,000 Christian prisoners to be sold as slaves in Alexandria, in addition to a crew of 60. See Goitein, *Mediterranean Society*, 1:215; Pryor, "Medieval Muslim Ships of Pisa," 104.

[25] Although Archimedes established a mathematical rule when supervising the construction of *Syracusia* owned by Hieron II (306–215 B.C.), shipwrights around the Mediterranean did not follow any fixed scientific and/or official method of ship measurement. See Casson, *Ships and Seamanship*, 172, 191–199; Torr, *Ancient Ships*, 27; Wallinga, "Unit of Capacity," 23–27. Wallinga's conclusion is also applicable to the Muslim world. When chartering or building a ship the contractors had to define her capacity according to the place from which the cargo was fetched. See Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:447; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Qarāfī, *Al-Dhakīra*, 1:355; Minhājī, *Jawāhir al-ʿUqūd*, 1:94–96, 293–294.

[26] Most Byzantine and Islamic sailing vessels were of small or medium displacement for various reasons. First, they could shelter in artificial harbors or natural estuaries and bays when facing manmade or climatic dangers. Second, their owners paid lower port dues. Third, these vessels were more maneuverable so they could anchor in intermediate ports when sailing in sight of land. Fourthly, they could probably escape attack more easily. See Makris, "Ships," 1:95–96; Letsios, *Das Seegesetz der Rhodier*, 86–87; Goitein, *Mediterranean Society*, 1:305–308; Unger, *Ship in the Medieval Economy*, 46–49, 64–67.

[27] Scott, *op. cit.*, 11:230, Digest L, 5, 3: "Exemption from public employments is granted to those who have constructed ships destined for the transport of provisions

of grain) were considered to have the minimum capacity necessary for seaworthy vessels, while ships of 50,000 *modii* (650 cubic-meters/340 tons) to 70,000 *modii* (910 cubic-meters/476 tons) were the most seaworthy.[28] Such sizes, carrying grain, were probably presumed able to withstand the effect of waves and winds *en route* from the provinces to Rome and Constantinople.[29]

In contrast to naval strength, which was funded and organized by central regimes and provincial administrations,[30] merchant shipping was managed by wealthy statesmen, merchants, entrepreneurs[31] and ecclesiastical institutions. The Church of Alexandria, for instance, maintained shipyards, employed shipwrights and seamen, and financed and oversaw the construction of her commercial fleets. From the sixth century her merchantmen plied the Mediterranean, Adriatic, Aegean, Black, and Red seas.[32] Nevertheless, the historical data already

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for the Roman people, which have a capacity of not less than fifty thousand measures of grain, or several, each of which has a capacity of not less than ten thousand measures, as long as the said ships are suitable for navigation, or where they provide others in their stead." A similar edict was promulgated in the sixth century and remained effective through the succeeding centuries. *Ibid.*, 12:17–18, Code of Justinian 1.2.10 (henceforth = CJ).

[28] Sirks, *Food for Rome*, 26–27, 62, 124, CTh 13.5.4, orders ship owners not to overload their vessels; van Doornick, "Byzantium, Mistress of the Sea," 139–140; Pryor, *Geography, Technology, and War*, 27–28; Makris, "Ships," 1:97; Letsios, *Das Seegesetz der Rhodier*, 89–90; Lopez, "Role of Trade," 80. Sizes and dimensions of Byzantine merchantmen are extensively addressed by McCormick, *Origins of the European Economy*, 415–418. Oversized merchant vessels could carry as much as 3,650 tons. For further historical data on the tonnage of Greco-Roman merchant vessels, consult Torr, *Ancient Ships*, 25–31.

[29] One may suggest that the construction of ships can be linked to political and economic factors, besides, of course, to the availability or raw materials. Regarding the first two factors, political upheavals and unsafe maritime lanes signify commercial decline, reduction in the dimensions of ships, and retreat in the overseas trade.

[30] Since the dawn of civilization, central authorities have funded and closely supervised the construction of defensive and offensive navies. For the role of Roman and Byzantine imperial authorities and Islamic Caliphate in building their naval power, see: Starr, *Roman Imperial Navy*, 30–45, 106–124; Ahrweiler, *Byzance et la mer*, 45–92. Letsios assumes that many Byzantine shipyards concurrently served for the construction of warships and trading vessels, and so were the arsenals of Islamic Mediterranean. See Letsios, *Das Seegesetz der Rhodier*, 83–85; Fahmy, *Muslim Naval Organisation*, 87–114.

[31] Sirks, *Food for Rome*, 132–133.

[32] Bagnall, *Egypt in Late Antiquity*, 291–292; Monks, *Church of Alexandria*, 349–362. The Coptic Church extended her maritime services to develop the Umayyād and ʿAbbāsīd military fleets in her arsenals. Fahmy points out that Yazīd Ibn Muʿāwiya (60–64 A.H./680–683 A.D.) compelled the monks of Egypt to build ships for the Egyptian military fleet, a practice followed during the ʿAbbāsīd era. This is sufficient evidence that the Coptic Church continued to play a vital role in shipbuilding in

presented should not be interpreted to mean that the imperial administration was negligent in supervising civil shipping. On the contrary, during the fourth century the governor of the province was responsible for the inspection, construction, and registration of ships.[33] In subsequent centuries, the *sekreton* of the sea,[34] but not the *agoranomos*,[35] was responsible for determining the capacity and registration of ships.[36] The twelfth century *sekreton* ceased to exist after 1204 C.E. and the civilian service responsibilities passed to the *kommerkiarioi*.[37] Besides enforcing the overloading regulations, the *sekreton* collected charges for registration, docking, arrival, departure, and passage.[38] Although Byzantine sources do not clearly refer to the *sekreton* of the sea prior to the twelfth century, it is plausible to surmise that such a civic department or its equivalent must have existed in major Byzantine ports between the seventh and tenth centuries.

Unlike the Byzantine *agoranomos* (eparch or prefect), but similar to the *sekreton* of the sea, the office of Islamic *muḥtasib* (market superintendent) supervised, *inter alia*, shipbuilding and carriage by sea.[39] The *muḥtasib* was helped by assistants called *ʿurafāʾ al-ṣināʿa* (inspectors of shipbuilding), whose main task was to ensure that shipwrights observed technical standards and did not use inferior or inadequate

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the early Islamic Mediterranean. See Fahmy, *Muslim Naval Organisation*, 106–107; Makris, "Ships," 1:94.

[33] Pharr *et al.*, *Theodosian Code*, 395, Article CTh 13.5.27; Sirks, *Food for Rome*, 132–133, 135.

[34] The *sekreton* was a governmental official in charge of the merchant fleet and registration of mercantile ships.

[35] On the prerogative civic and judicial authorities of the *agoranomos* in Romano-Byzantine daily life, consult Daniel Sperber, *The City in Roman Palestine* (Oxford: Oxford University Press, 1998), 32–47; M.G. Raschke, "An Official Letter to an *Agoranomus*," *The Bulletin of the American Society of Papyrologists* 18 (1976), 17–29; Arnold H. Jones, *The Greek City from Alexander to Justinian* (Oxford: Oxford University Press, 1966), 215–217, 255.

[36] Concerning the exercise of government authority role in the inspection of merchantmen in the fourth century, see Pharr *et al.*, *Theodosian Code*, 399, Article CTh 13.5.27; Sirks, *Food for Rome*, 135.

[37] Makris, "Ships," 1:94. The literal meaning of *kommerkion* is a tax on merchandise collected by customs officials on goods imported into the empire or reaching Constantinople by sea. This term appears in Byzantine sources around 800. See Kazhdan *et al.*, *Oxford Dictionary of Byzantium*, 2:1141–1142; McCormick, *Origins of the European Economy*, 535.

[38] Makris, "Ships," 1:95.

[39] On the office of the *agoranomos* and *muḥtasib* in the Byzantine and Islamic societies, consult Benjamin R. Foster, "*Agoranomos* and *Muḥtasib*," *Journal of the Economic and Social History of the Orient* 13 (1970), 128–144.

raw materials.[40] Exacting and thorough inspections were carried out to avoid human and financial losses; therefore, whoever violated these regulations was punished. While the ship was still in the yard, a comprehensive technical inspection had to be carried out by the *muḥtasib*, the captain, and the ship's scribe.[41] Islamic law entitled seamen and lessees not to honor a leasing contract if a technical defect was discovered.[42] The working hours of carpenters, including shipwrights, began in the morning and ended before evening.[43] Accordingly, commercial ships must have been inspected between sunrise and sunset, but not in the evening, prior to the loading of cargo.

The office of the *muḥtasib* determined the amount of cargo the ship could carry. When the cargo was stowed and the ship was ready to depart, an official examination to prevent overloading was requested by the *muḥtasib*, or his representative (an inspector) and the captain.[44]

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[40] Some *ḥisba* manuals precisely define the quantity and quality of raw materials needed to construct a ship. Occasionally, *muḥtasib*s like al-Saqaṭī specified rope length, thickness, twine, and type of fiber, besides the number, kind, and weight of nails required. Furthermore, he fixed the daily wage of a professional shipwright. See Abū ʿAbd Allāh Muḥammad Ibn Abū Muḥammad al-Saqaṭī, *Un manuel hispanique de ḥisba* (*Ādāb al-Ḥisba*), eds. G.S. Colin and E. Lévi-Provençal (Paris: Librairie E. Leroux, 1931), 71–72; ʿAssem M. Rezq, "The Craftsmen of Muslim Egypt and Their Social and Military Rank during the Medieval Period," *Islamic Arhaeological Studies* 3 (1988), 7; Moshe Gil, *In the Kingdom of Ishmael: Texts from the Cairo Geniza* (Tel Aviv: Tel Aviv University Press, 1997)(Hebrew), 2:880, TS NS J 198, margin 4: ". . . ʿAbd al-Salām, who is in charge of building the state vessels (*mutawallī ʿamārat marākib al-dīwān*)." Notice: The numeral in square brackets is the serial call number of the document as listed and edited by Gil and Ben-Sasson in their corpuses of Geniza documents.

[41] Ibn Bassām al-Muḥtasib, *Nihāyat al-Rutba*, 148, 157; Azemmouri, "*Nawāzil* d'Ibn Sahl," 40; ʿAbd al-Laṭīf al- Baghdādī, *Al-Ifāda wa'l Iʿtibār*, translated into English and edited by Kamal H. Zand *et al.*, (London: George Allen and Unwin, 1965), 176–177; Ibn Mājid, *Fawā'id*, 239: "Inspect the whole hull of the ship while she is on land/dockyard and write down all her imperfections." The captain and his technical crew were required to inspect the hull, tackle, and nautical instruments while at sea. On p. 241 he writes: "You must inspect the equipment of the ship from time to time."

[42] Abū Bakr Aḥmad Ibn ʿAbd Allāh Ibn Mūsā al-Kindī, *Al-Muṣannaf* (Masqaṭ: Wizārat al-Turāth al-Qawmī wal-Thaqāfa, 1983), 21:153–154.

[43] Goitein, *Mediterranean Society*, 1:97.

[44] Ibn Mājid, *Al-Fawā'id*, 29: "You [the captain] should not load the ship more than her actual capacity." On p. 242 he adds: "Never overload the ship." Note that it was normal for port authorities to seize ships' rudders in order to ensure compliance with governmental requirements. A Geniza letter written around 1060 describes how the ships' rudders were ashore because the port authorities had not yet released them. See S.D. Goitein, *Letters of Medieval Jewish Traders* (Princeton: Princeton University Press, 1973), 322–323, TS 8 J 24, f. 21; Menahem Ben-Sasson,

The *ḥisba* manuals plainly state that a ship can be freighted with cargo as long as the plimsoll mark (load line) on the outer hull is visible. Islamic law required a load line on each ship to indicate how deeply the ship could legally be submerged. The plimsoll mark along the outer hull could not lie more than a specific depth below the water surface. Measures against overloading aimed to prevent not only sinking, but also overexertion of the rowers.[45] If these instructions and regulations were familiar to Muslim shippers and ship owners, how, then, did Muslim judicial authorities handle overloading cases in court? What did they advise the contracting parties to do about observed overloading while the ship was still anchored or underway? Were the *qāḍī*s' verdicts based on legal precedents of Romano-Byzantine lawyers?

An inquiry addressed personally to Abū al-Qāsim Ibn Ziyād Ibn Yūnus (d. 361 A.H./972 C.E.) states:

> I was personally asked about a group loading their cargo on a vessel. After they departed, they were caught in a violent gale and feared sinking. They discovered that they had overloaded the ship and decided to unload a part of the cargo on the coast. The owners of goods argued about whose cargo should be unloaded. I hold: If the shipper, who loaded his cargo first is known, he calls for the subsequent one to unload his own—so does the second with regard to the third, and so on, until the vessel reaches her actual capacity and the extra loads are discharged. If the loading order is unknown, then each shipper

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The Jews of Sicily 825–1068: Documents and Sources (Jerusalem: Ben-Zvi Institute, 1991) (Hebrew), 588–592; Gil, *In the Kingdom of Ishmael*, 4:194–197; Olivia R. Constable, *Trade and Traders in Muslim Spain: The Commercial Realignment of the Iberian Peninsula 900–1500* (Cambridge: Cambridge University Press, 1994), 114–121.

[45] The *ḥisba* manuals required ship owners not to overload their vessels or set out during a gale for fear of sinking. Ibn Bassām, *Nihāyat al-Rutba*, 148, 157; Ibn al-Ukhuwwa, *Maʿālim al-Qurbā*, 324; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 235–236; Abū al-Ḥasan ʿAlī Ibn Muḥammad al-Māwardī, *Al-Aḥkām al-Sulṭāniyya wal-Wilāyāt al-Dīniyya* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1978), 257; *idem*, *Al-Rutba fī Ṭalab al-Ḥisba* (Cairo: Dār al-Risāla, 2002), 356; Muḥammad Ibn Aḥmad Ibn ʿAbdūn al-Tujībī, *Le traité d'Ibn ʿAbdūn: A Seville musulmane au debut du XII siècle*, traduit avec une introduction et des notes par: E. Lévi-Provençal (Paris, 1947), 63–64. All rowed vessels were carefully constructed so that the oarage system achieved maximum efficiency. There was very little tolerance and lowering a ship in the water excessively by overloading would completely disrupt the mechanics of the oarage system and even make it impossible for men to row. For further details on the oarage system of the seagoing vessels, refer to John H. Pryor, "From *Dromōn* to Galea: Mediterranean Bireme Galleys A.D. 500–1300," in *The Age of the Galley: Mediterranean Oared Vessels since pre-Classical Times*, ed. by Robert Gardiner and John Morrison (London: Naval Institute Press, 1995), 101–116.

> unloads a fixed proportion of his cargo. If they unload a tenth of the vessel's contents, every shipper unloads a tenth of his cargo, and if it is a fifth, then every one unloads a fifth. Some of our fellow jurists have ratified this ruling.[46]

If the loading arrangement were known, the parties would follow the principle first in, last out: the last merchant to load was the first required to unload his cargo. If the order were unknown, unloading would be proportionately divided among all shippers. Furthermore, Muslim *fuqahā'*, like Ibn al-Mukwī (324–401/936–1010), considered cases where, due to negligence on the part of the shippers and/or ship owners, the vessel was overloaded and part or all of her contents was damaged or lost at sea. The inquiry reads as follows:

> Abū 'Umar Ibn al-Mukwī was asked about a group shipping cargo on a vessel. Thereafter, a man brought his own load to be conveyed with theirs. The ship owner and merchants told him that the vessel was already full, and any additional freight would overload and jeopardize her. This happened in the winter. The cargo owner said: "Transport me [and my cargo] aboard the vessel. If it arrives safely, I retain my property. However, if it is jettisoned, then I will not claim restitution from you." He loaded the shipment under these conditions and set sail. While *en route*, a violent gale compelled them to jettison his cargo. Thereafter he wanted to claim restitution from them for his jettisoned property. Is he eligible to do so or not? Response: Yes, he is entitled to bring a claim against them.[47]

Ibn al-Mukwī's positive response may have arisen because the ship owner and merchants had already realized that the ship was fully loaded, but they nonetheless overlooked the safety regulations. On the grounds of violating rules against overloading and intentional negligence by the carriers, that unluck shipper could sue them and seek compensation for his losses. In principle, the violator is liable for the loss and any damage to the cargo, and he alone would have to indemnify the owners. This ruling corresponds with Article III:22 of the N. N., which decrees:

> . . . If the captain is minded to put in other cargo after this, if the ship has room, let him put it in; if the ship has no room, let the merchant before three witnesses resist the captain and sailors; and, if there is jettison, it will rest with the captain, but if the merchant does not prevent it, let him come to contribution.[48]

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[46] Ṭāher (ed.), *op. cit.*, 50–51.
[47] *Ibid.*, 50.
[48] Ashburner, *op. cit.*, 102–103; Letsios, *Das Seegesetz der Rhodier*, 97–99, 158, 262.

This Article can be interpreted in two ways. First, the captain and his seamen are solely responsible for losses incurred due to intentional overloading. Second, shippers are obliged to pay contribution only if they collaborate with those in charge of the vessel in overloading her. Loss must be distributed proportionally among the merchants with due application of the rules of general average. Muslim jurists not only favored the Rhodian ruling, but also required the violator to indemnify the merchants for damages in half the amount of the actual cargo value.[49] The ship owner was presumably not liable for total loss or for damage if the guidelines against overloading were transgressed without his knowledge.

The rules against salvaging flotsam that may cause overloading are well documented in Byzantine and Islamic digests. Article III:22 of the N. N. refers to overloading at the loading berth, but does not refer to overloading caused by spontaneous salvage operations at sea. However, it instructs the contracting parties in general to abide by the rules against overloading. By contrast, Muslim jurists explicitly forbid the contracting parties to salvage cargo found on the water surface if such an act would overload and endanger their vessel.[50] Those involved in overloading would be solely liable for the losses.[51] Amazingly, some jurists approved of abandoning ill-fated people on the high seas if the rescuers' fate was jeopardized.[52] However, one

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[49] Abū Zakariyyā Yaḥyā Ibn Sharaf al-Nawawī, *Rawḍat al-Ṭālibīn* (Beirut: Dār al-Kutub al-'Ilmiyya, 1992), 7:190.

[50] Qāḍī 'Iyāḍ, *Madhāhib al-Ḥukkām*, 235–236.

[51] Khalilieh, *Islamic Maritime Law*, 33; Gil, *In the Kingdom of Ishmael*, 2:526 [180]; S.D. Goitein, "Jewish Trade in the Mediterranean at the Beginning of the Eleventh Century," *Tarbiz* 36 (1967) (Hebrew), 378–379, TS 10 J 19, f. 19, ll. 11–14: "By God, my master, when I recovered the sixteen bales [thrown overboard from Sicilian ships], I suffered harder than if I were to have loaded a hundred bales . . . and whoever I asked to transport them turned me down." Thus Ephraim Ibn Ismā'īl al-Jawharī described in a letter dated from 1030s to Joseph Ibn 'Awkal how the shipmaster refrained from shipping bales recovered after being thrown overboard, for fear they would overload and endanger his vessel. For safety regulations in medieval Italian city states, see John E. Dotson, "Safety Regulations for Galleys in Mid-Fourteenth Century Genoa: Some Thoughts on Medieval Risk Management," *Journal of Medieval History* 20 (1994), 327–336; *idem*, "A Problem of Cotton and Lead in Medieval Italian Shipping," *Speculum* 57 (1982), 52–62; *idem*, "Freight Rates and Shipping Practices," 117–138; Frederic C. Lane, "Tonnages, Medieval and Modern," *The Economic History Review* 17 (1964), 213–233; *Venice and History: The Collected Papers of Frederic C. Lane* (Baltimore: The Johns Hopkins Press, 1966), 253–268; Eugene H. Byrne, *Genoese Shipping in the Twelfth and Thirteenth Centuries* (Cambridge MA: The Medieval Academy of America, 1930), 9–12.

[52] Abū al-Walīd Muḥammad Ibn Aḥmad Ibn Rushd, *Al-Bayān wal-Taḥṣīl wal-Sharḥ wal-Tawjīh wal-Ta'līl fī Masā'il al-Mustakhraja* (Beirut: Dār al-Gharb al-Islāmī,

may speculate, though I have found no reference to such an instance, that since aiding persons in distress at sea was categorized as a moral duty, some shippers may probably have opted to jettison part of the vessel's contents for the sake of human lives.

Names

Naming ships is a custom dating back to the biblical period. Ahmose, the first pharaoh of the New Kingdom, who ascended the throne in 1567 B.C., named Egyptian warships after god-kings, army commanders, animals, and major deities.[53] Similarly, the Athenians of the fifth and fourth centuries B.C. named their warships. Names of ships could be persons, places, things, their qualities, epithets or cult titles, or even those of sea nymphs. Additionally, they could refer to an aspect of the ship's appearance, her speed, her warlike qualities, or honor the healing deities.[54]

Like those of their Egyptian predecessors, ships of the Athenian fleet were named for both real and mythological animals.[55] Some ships bore the names of geographical areas, while other names had political significance or reflected their function.[56] The Romans also often named their ships after mythological figures or used common nouns and adjectives. Likewise, they named them after real and mythological animals, in addition to geographical locations, deities, rulers and army commanders.[57]

Whereas the naming of military ships originated as a biblical maritime custom, one of the earliest records of a named commercial vessel traced to 240 B.C. and called *Syracusia*, in honor of the Sicilian port of Syracuse.[58] Although neither Roman nor Byzantine maritime laws insisted on owners naming their ships, legal papyri from pre-Islamic Egypt show that merchantmen were commonly called after

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1984), 10:164–165; 15:447–448; 16:76–77; Abū Muḥammad ʿAlī Ibn Aḥmad Ibn Ḥazm, *Al-Muḥallā bil-Āthār* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1988), 7:27; Qarāfī, *Dhakhīra*, 9:92–93; *idem*, *Furūq* (Tūnis, 1885), 4:11; Kindī, *Al-Muṣannaf*, 18:62; Khalilieh, *Islamic Maritime Law*, 155–156.

[53] Casson, *Ships and Seamanship*, 348–349.

[54] *Ibid.*, 350–352.

[55] *Ibid.*, 352–353.

[56] *Ibid.*, 353–354.

[57] *Ibid.*, 355–358.

[58] *Ibid.*, 359–360.

their proprietors or captains; some bore the names of places, common adjectives, or sacred figures.[59] From the second half of the third century B.C., naming merchantmen became common practice, though it was not statutory.[60] Neither the Justinianic Digest nor the N. N. dictated that owners had to name their commercial vessels.

As times changed, so did imperial regimes and provincial governments, but some maritime practices in the former territories of Byzantium remained in effect for centuries. Although primary Arabic sources rarely refer to names of ships, numerous business letters from the Cairo Geniza place great emphasis on this topic and establish that ships normally bore their proprietors' given or family names,[61] or, less frequently, those of their captains. Merchantmen could also bear names referring to characteristic decorations. Occasionally names of individual ships reflected travelers' experience on them. Lastly, supercargo carriers were infrequently named after geographical locations, such as their destination or port of origin.[62]

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[59] J. Enoch Powell, *The Rendel Harris Papyri of Woodbrooke College, Birmingham* (Cambridge: Cambridge University Press, 1936), 79, Pap. 201b; Peter Parsons, *The Oxyrhynchus Papyri* (London: Egypt Exploration Fund, 1974), 170, Oxy. 3079; Crum, *Catalogue of the Coptic Manuscripts*, 75–76, Pap. 144 and pp. 158–159, Pap. 338; Bernard Grenfell and Arthur Hunt, *The Hibeh Papyri* (London: Egypt Exploration Society, 1906), 1:271, Pap. Mummy 117; Casson, *Ships and Seamanship*, 359–360.

[60] Ashburner, *op. cit.*, clv; Makris, "Ships," 1:94: "The names of ships owned exclusively by Greeks of Constantinople are found for the first time in the documents drawn up in 1360/61 at Kellia, on the Danube estuary, by the Genoese notary Antonio di Ponzò; the vessel of one Konstantinos Mamalis was called *Sanctus Nicolaus*, while that of the monastery of St. Athanasios was the *Sanctus Tanassius*. Naming ships, which for the Romans but not for the Byzantines was a component of their legal existence, must have become general in later times."

[61] Naming the ships after their proprietors was an indication of ownership.

[62] Khalilieh, *Islamic Maritime Law*, 27–29, covers this topic, which thus need not be reiterated. However, to acquire a more comprehensive idea regarding ships' names and proprietors in the late tenth through the early twelfth centuries, consult: ʿAodeh, "Types of Vessels and their Ownership," 282–297; Gil, *In the Kingdom of Ishmael*, 4:924–928 (index); Taqiyy al-Dīn Aḥmad Ibn ʿAlī al-Maqrīzī, *Al-Mawāʿiz wal-Iʿtibār fī Dhikr al-Khiṭaṭ wal-Āthār* (Cairo: Maktabat Madboulī, 1998), 2:321; Hady R. Idris, *La berbérie orientale sous les Zirides X^e–XII^e siécle*, trans. by Ḥamādī Sāḥlī (Beirut: Dār al-Gharb al-Islāmī, 1992)(Arabic), 2:284; TS Misc 25.103, ll. 15–21: "(15) I noticed your remark, (16) my master, that I wrote you so little last (17) year, and wish to inform you that I sent letters (18) with Shaykh Abū ʿAbdallāh Ibn Abū al-Katā'ib, (19) and a consignment as well, to you from me, in the (20) Jurbattan ship, the ship of the Sulṭān." The Jurbattan ship was named after her port of destination. Jurbattan appears again in line 28 of the same letter from Khalaf Ibn Isaac, of ʿAden, to Abū Isḥāq Abraham Ibn Peraḥya, known as Ibn Yijū, Jurbattan, India in the month of Elul (30 July–27 August) 1147.

Although naming warships aimed to distinguish either a type of unit or the components of a fleet, commercial ships required names for legal and official procedures. Names of vessels had to be mentioned in the leasing contracts that chartered particular vessels to ensure that the lessors would not carry the cargo aboard the incorrect ships. If either or both parties to the contract failed to name the ship in their agreement, the contract would be considered void, especially if it were signed upon the hiring of a specific ship.[63] Documentary evidence concerning sale transactions from Romano-Byzantine Egypt and from Islamic jurisprudential references emphasizes that a ship's sale and purchase was not legal unless seller and purchaser explicitly record the ship's name together with a full technical description of her.[64] After completing the transaction, the new proprietor could rename the vessel if he wished. In bottomry loans, for which ships served as security and the lenders still had potential legal claims against the debtors, or in a sea loan contract, when the borrower was a ship owner, the latter had to specify her name when pledging his ship as security.[65]

Officially, each merchantman anchored in Byzantine and Islamic harbors alike had to be identified and registered by the port superintendent. Government officials at the port registered the name of each incoming or departing vessel, her port of origin, arrival date, captain's name, quantity and quality of commodities assessed for tariff, number of passengers on board, and their names and nationalities. Registrations were conducted to ensure that merchants did not evade custom duties, while seamen and ships could smoothly be recruited and conscripted for the state service.[66] In addition, by iden-

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[63] Ṭāher (ed.), *op. cit.*, 17; Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:447; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*), 8:80–81; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Minhājī, *Jawāhir al-ʿUqūd*, 1:293–294; Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:659.

[64] Porten *et al.*, *Elephantine Papyri*, 486–490, P. Lond. V 1726; Hunt, *Oxyrhynchus Papyri*, 253, Oxy. 2136; Cecil, *Ancient Ships*, 65–66; Ṭaḥāwī, *Al-Shurūṭ al-Kabīr*, 106; *idem*, *Al-Shurūṭ al-Ṣaghīr*, 1:266–267; Qarāfī, *Dhakīra*, 10:355; Minhājī, *Jawāhir al-ʿUqūd*, 1:95.

[65] George M. Calhoun, "Risk in Sea Loans in Ancient Athens," *Journal of Economic and Business History* 2 (1930), 572, 573–574. The ship to transport the cargo was named to ensure that that particular ship was seaworthy and her master and crew were professional and trustworthy.

[66] Hélène Ahrweiler, "Fonctionnaires et bureaux maritimes à byzance," *Revue des Études Byzantines* 18 (1960), 246–247; *idem*, "Les ports byzantins (*VII^e–X^e siècle*)," in *La navigazione mediterranea nell'alto medioevo* (Spoleto: Centro Italiano di Studi sull'alto Medioevo, 1978), 281–283; *idem, Byzance et la mer*, 164–165; Sherman, "Roman

tifying a ship by name, police could often utilize the port superintendent's records to identify suspicious travelers.[67] Hence we may infer that it was not optional but obligatory for proprietors to name their ships. Three explanations may be possible for the lack of Byzantine documentary and legal evidence. First, there could be historical documents as yet undiscovered and/or unpublished. Second, Byzantine legists may have marginalized this matter. Third, naming ships possibly became so common and recognized as a practice that it required no mention in law books. Otherwise, how can we explain why Greek and Coptic papyri on ship sale and leasing contracts from pre-Islamic and early Islamic times always refer to ships by their names?

Summary

Except for the Muslim introduction of the lateen sail[68] and advanced nautical instruments such as the compass and astrolabe, the typology and design of ships set out by Greek and Coptic shipwrights remained virtually unchanged until the advent of the First Crusade in the Levant in 1099. Technically, Byzantine and Islamic seagoing merchant ships were medium sized with a rounded hull and length to beam ratios of 3:1 or 4:1. Lacking a uniform standard for calculating ships' capacities in the Mediterranean world, shipwrights reckoned cubic contents in accordance with standards established by

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Administrative Marine," 2:68–76; Pharr *et al.*, *Theodosian Code*, 361, Article CTh 12.1.134; 389, Article CTh 13.6.7; 420–421, Article CTh 14.21; Scott, *op. cit.*, 11:230, Digest L, 5, 3; Makris, "Ships," 1:94–95; Letsios, *Das Seegesetz der Rhodier*, 107–108; Sperber, *Nautica Talmudica*, 114–118; TS 16.215*v*, ll. 3–4 (*India Book*, letter 187); Ḥimyarī, *Al-Rawḍ al-Miʿṭār*, 80; Muḥammad Ibn Aḥmad Ibn Jubayr, *Riḥlat Ibn Jubayr* (Beirut: Dār Ṣāder, 1959), 13; Abū al-Ḥasan ʿAlī Ibn ʿUthmān al-Makhzūmī, *Al-Minhāj fī ʿIlm Kharāj Miṣr*, ed. by Claude Cahen and Yūsuf Rāghib (Caire: Institut Français d'Archéologie Orientale, 1986), 49; Claude Cahen, "Douanes et commerce dans les ports méditerranéens de l'Egypte médiévale d'après le minhādj d'al-Makhzūmī," *Journal of the Economic and Social History of the Orient* 7 (1964), 303; Constable, *Trade and Traders*, 126–132; Khalilieh, *Islamic Maritime Law*, 82–86, 116–119.

[67] TS 16.215*v*, ll. 2–5.

[68] The introduction of the lateen sail to Mediterranean mariners is still disputed. Some scholars assume that the Muslims were not responsible for that and it evolved in late Roman antiquity. Another group believes otherwise claiming that it owes its introduction to the early decades of the seventh century.

the local custom of each territory. Although nongovernmental bodies managed the shipping industry, state officials closely inspected merchantmen in the processes of construction and loading, and promulgated strict rules against overloading.

For procedural, security, and legal reasons, Byzantine and Muslim ship owners had to name their vessels. The hypothesis of Ashburner and Makris that Byzantine ships did not have names until the thirteenth century seems inaccurate. Greek and Coptic papyri from Byzantine and subsequently Islamic Egypt, as well as pre-eleventh century historical evidence from the Christian world, seem to make it clear that commercial ships were named. Similarly, even though the A. S. never refers explicitly to the naming of ships, contemporary Islamic legal formulae and *responsa* mention, though briefly, the legal significance of the procedure. Compared to domestic and international shipping problems in their entirety, names of ships in Byzantine and Islamic codices were less important. Jurists, shippers, and ship owners gave their attention to legal matters arising from the transport of cargo and freight in relation to the technical specifications of the ship. The ship's name and technical descriptions were specified when a lessee hired a particular vessel, different from the hire of a non-specified ship, an issue discussed in Chapter Three.

CHAPTER TWO

THE VESSEL'S HUMAN COMPLEMENT

Ownership

From the most ancient of civilizations through to the present, there have been three methods of acquiring a ship: building her, transferring her from an owner, or usurpation and confiscating her. The provisions placed in a shipbuilding contract dated as early as 535 C.E., included of the ship's technical description, price, inspection of work in process, time and place of delivery, and the transfer of title.[1] Once construction was completed, the buyer obtained possession of the ship ordered from the seller. Transfer of a ship from an owner could be through inheritance, by bill of sale, or following bankruptcy. For example, in a deed of inheritance dated March 8th, 584 or 585, a father devised a share of a boat to one of his family members.[2] More informative is the ship sale and purchase contract. In a typical outright sale or lease, legal ownership and/or physical possession of the ship passes instantly to the buyer in exchange for payment of the purchase price.[3] Bankruptcy may lead to an involuntary transfer. A Geniza business letter from September 30th, 1030, documents a case where the judge at the port of Alexandria ordered the sale of a Tunisian commercial vessel to compensate the lessees.[4]

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[1] Bernard Grenfell *et al*., *The Oxyrhynchus Papyri* (London: Egypt Exploration Fund, 1924),16:105–106, Oxy. 1893; Sirks, *Food for Rome*, 132–133.

[2] Bell, *Greek Papyri in the British Museum*, 5:182–183, Pap. 1728. The rules governing inheritance are addressed in various sections of the Digest mainly XXXVII, 1; XXXVII, 2; XLI, 1, 61; McCormick, *Origins of the European Economy*, 544 refers to three brothers, who inherited a ship from their father; Noble, "Principles of Islamic Maritime Law," 39–40.

[3] Hunt and Edgar, *Select Papyri*, 1:113–117, P. Lond. 1164 (*h*); Hunt, *Oxyrhynchus Papyri*, 17:250–253, Oxy. 2136; Bell, *Greek Papyri*, 5:178–179, Pap. 1726; Porten *et al*., *Elephantine Papyri*, 486–490, P. Lond. V 1726; Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:266–267; Qarāfī, *Al-Dhakīra*, 10:355; Minhājī, *Ǧawāhir al-ʿUqūd*, 1:94–96; Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:659; Noble, "Principles of Islamic Maritime Law," 39.

[4] Goitein, "Jewish Trade," 387, TS 13 J 17, f. 11, ll. 11–14; Ben-Sasson, *Jews of Sicily*, 226–229 [55]. The vessel in question was sold for three hundred *dīnār*s.

As for usurpation, a ship could be, restrained, detained, or seized, and subsequently confiscated, as a consequence of hostilities.[5]

The Justinianic Corpus Juris Civilis makes a clear distinction between ownership and possession:

> There is this difference between ownership and possession: that a man remains owner even when he does not wish to be, but possession departs once one decides not to possess. Hence, if someone should transfer possession with the intention that it should later be restored to him, he ceases to possess.[6]

Ownership, as defined by the Digest, accords full legal rights of proprietorship, which cannot be transferred to or exercised by another party without the consent of the actual owner.[7] In transferring title, the transferor cannot pass on to the transferee any rights that his title conferred on him.[8] Mere delivery of the ship does never transfer ownership, except when there is a prior sale or other grounds from which the delivery follows.[9] Unlike ownership, possession signifies direct occupancy, use, or control of real property by another with the permission or on behalf of the actual owner. It is often associated with long-term rights to use a property, established by a lease or tenure contract, as a result of which the actual owner no longer occupies or has physical control of the vessel.[10] The legal rules concerning ownership and possession, established by Roman lawyers and re-promulgated by Justinian I, were in effect in Byzantium throughout the early medieval period or even later.[11]

Islamic law defines ownership as "the expression of the connection between a man and a thing, which is under his absolute power and control to the exclusion of control and disposition by others."[12]

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[5] Digest XLI, 1, 51; Digest XLI, 1, 53; Phillipson, *International Law*, 2:381–382; Khalilieh, *Islamic Maritime Law*, 118–119, 141–148; Noble, "Principles of Islamic Maritime Law," 47–48.

[6] Alan Watson, *The Digest of Justinian* (Philadelphia: University of Pennsylvania Press, 1998), Digest XLI, 2, 17, 1.

[7] Digest XLI, 2, 5.

[8] Digest XLI, 1, 20; Digest XLI, 1, 26: If some owner delivers cypress planks at his consent to another party, who later uses them to build a ship, the latter retains full title of the vessel on the ground that "the cypress wood no longer exists."

[9] Digest XLI, 1, 31.

[10] Digest XLI, 2 deals exclusively with the legal significance of acquisition and loss of possession in Roman law.

[11] Kazhdan *et al.*, *Oxford Dictionary of Byzantium*, 3:1545–1546, 1707–1708.

[12] Abdur Rahim, *The Principles of Muhammadan Jurisprudence according to the Hanafi, Maliki, Shafi'i and Hanbali Schools* (Lahore: All Pakistan Legal Decisions, 1963), 262.

Although the legal concept of ownership in Islamic jurisprudence and the Justinianic Digest is similar,[13] the former defines ownership by possession and does not distinguish between the two terms.[14] There are three types of ownership of a physical property, such as a vessel: *milk raqaba* (right of ownership), *milk al-yad* (right of possession), and *milk al-taṣarruf* (right of disposition). In addition to absolute ownership, Muslim jurists recognized joint or co-ownership and encouraged it for commercial purposes. They generally classified partnership (*sharika*) as one of three categories: *amlāk* (proprietary), *ʿuqūd* (contractual or commercial), and *ibāḥa* (permissible).[15] In Islamic law ownership may cease as a result of transfer, usurpation, or apostasy of Islam by the owner.[16]

Shipping business was always costly and, therefore, only a small sector of society engaged in it. On the eve of the Islamic conquest of Egypt, the Church of Alexandria controlled most commercial shipping on the Nile, on the Mediterranean and Red seas, as well as on the Indian Ocean. The Patriarch of the Church hired seamen, maintained a commercial fleet and a dockyard, and regulated maritime laws.[17] Records from Christian Europe show that ships owned by institutions, including cathedrals and monasteries, plied the northern waters of the Mediterranean and beyond.[18] Fortunatus of Grado,[19] or perhaps the denomination church, of which he was member, had four ships that received toll-free status in all Charlemagne's dominions.

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[13] Roman lawyers and subsequently Muslim jurists excluded commons—such as air, light, fire, grass, water of the sea, rivers, streams, public roads, *etc.*—from turning into property since they are indispensable to individual and social life. However, the only circumstance when such things could turn into private possession is when it does cause damage to the community. See W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge: Cambridge University Press, 1963), 182–183; Fenn, "Justinian and the Freedom of the Sea," 723–724; Potter, *Freedom of the Seas*, 25; Rahim, *Principles of Muhammadan Jurisprudence*, 264–268.

[14] Schacht, *Introduction to Islamic Law*, 136.

[15] Noble, "Principles of Islamic Maritime Law," 33–37.

[16] Schacht, *Introduction to Islamic Law*, 138.

[17] Monks, "Church of Alexandria," 355–362; Bagnall, *Egypt in Late Antiquity*, 289–293.

[18] Robert Lopez, "The Trade of Medieval Europe: The South," in *The Cambridge Economic History of Europe*, ed. M. Postan and E.E. Rich (Cambridge: Cambridge University Press, 1952), 265.

[19] Grado (Gradus is the Latin for "port") is a seaport town, which was founded by the Romans in 181 B.C.E., located in northeast Italy today and in the northern portion of the Adriatic Sea, between Triest and Venice; it is 32.3 miles far from Trieste, 18 miles far from Udine and 74.5 miles far from Venice.

A ninth century hagiographic illustration depicts a ship belonging to the bishop of Palermo in a Libyan port on business.[20] Similarly, monks of the monastery of St. George on Skyros[21] owned commercial ships.[22] Other scanty, surviving sources might suggest that ship ownership in the Christian world was controlled by ecclesiastical institutions. Nonetheless, wealthy families also engaged in shipping, though their services were confined to domestic ports.[23]

Due to the short supply of raw materials, especially wood, high maintenance costs, the need to provide commercial vessels with fighting men to protect them against attacks, and the need to pay wages to seamen, ship owners in the Muslim world seemed to have been wealthy merchants, private entrepreneurs, and a small group of governmental officials.[24] Famous *amīr*s and governors engaged in shipping during the eleventh century, Geniza business letters constantly mention the Zīrīd governors of Ifrīqiya, namely al-Muʿizz Ibn Bādīs (406–454/1016–1062),[25] his aunt, referred to as al-Sayyida,[26] and his

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[20] McCormick, *Origins of the European Economy*, 406.

[21] Located 24 nautical miles from Kymi in Euboea and 118 nautical miles from Piraeus, the island of Skyros is the largest of the Sporades islands (133.5 sq. mile). The town of Skyros was turned by the Byzantines into one of the most important strongholds and fortresses in the Aegean Sea.

[22] Makris, "Ships," 1:94.

[23] McCormick, *Origins of the European Economy*, 516, 544. Digest XIV, 1, 1, 16 refers to women ship owners, an evidence of their involvement in the Roman shipping business and maritime trade. See Scott, *op. cit.*, 4:202.

[24] Nāṣīr-ī Khosraw, *Book of Travels (Safarnāma)* (New York: State University of New York Press, 1986), 39, describing the shipping business in the Egyptian seaport city of Tennis, writes: "The population of this city is fifty thousand, and there are at any given time at least a thousand ships at anchor belonging both to private merchants and to the *sulṭān*." Goitein, *Mediterranean Society*, 1:309–310; Abraham L. Udovitch, "Time, the Sea and Society: Duration of Commercial Voyages on the Southern Shores of the Mediterranean during the High Middle Ages," in *La navigazione mediterranea nell'alto medioevo* (Spoleto: Centro Italiano di Studi sull'alto Medioevo, 1978), 519–520; *idem*, "Merchants and Amīrs," *Asian and African Studies* 22 (1988), 58, 61–62; Olivia R. Constable, *Trade and Traders*, 121–124.

[25] Gil, *In the Kingdom of Ishmael*, 2:800 [268], TS 8 J 29, f. 11 (right margin, l. 1); 3:50 [318], ENA 2727.6B, ll. 5, 7, 9; 3: 239 [372], TS AS 145.81a, l. 12; 3:246 [373], TS 16.163 (I), l. 13*v*., l. 20; 3:258 [374], TS 12.226*v*., l. 17; 3:299 [382], ENA 2805.19*v*., 1; 3:443 [431], Bodl. MS Heb. d 66, f. 79, l. 16; 3:485, 486 [447], TS 8 J 27, f. 2, ll. 13, 17; 3:745, 747 [523], Bodl. MS Heb. d 76, f. 57*r*, ll. 5–6, *v*., l. 11; 3:848 [558], Mosseri VII 153, L. 8; 4:225 [669], TS Misc 8.103, l. 31; 4:447 [749], ENA NS 2 (I), f. 13, l. 14; 4:451 [750], Mosseri IV 36a, l. 14; 4:553 [782], TS 16.279, l. 31; 4:576 [790], ENA 2805.2A, l. 14; 4:608 [803], ENA NS 31.6*v*., l. 3.

[26] Ben-Sasson, *op. cit.*, 276, 277 [65], Bodl. MS Heb. c 28, f. 61*v*., ll. 7, 22, 23;

son and successor, Tamīm Ibn al-Muʿizz (454–501/1062–1108),[27] and Jabbāra, governor of Barqa.[28] Other rulers' names frequently reported by the Geniza traders are: Mujāhid al-ʿĀmirī, governor of Denia (402–435/1012–1044)[29] (Andalusia)[30] and his son ʿAlī Ibn Mujāhid, whose ships plied between Denia and Egypt from the 1040s to the 1060s,[31] Abū ʿAbd Allāh Muḥammad Ibn ʿAbd al-Raḥmān al-Ṣāʾigh, known as Ibn al-Baʿbāʿ al-Andalusī, the last Muslim governor in Palermo,[32] whose ships sailed the triangle of Alexandria,

370–371 [82], Bodl. MS Heb. c 3, f. 13, ll. 39–40; Gil, *op. cit.*, 2:600 [204], TS 12.325, l. 18; 3:155–157 [350], TS 12.339*r*, ll. 4, 19*v*., l. 2; 3:311 [387], BM Or 5544, f. 6, l. 5; 3:836 [553], Bodl. MS Heb. d 66, f. 81, l. 8; 3:919, 920 [576], Bodl. MS Heb. c 28, f. 61*v*., ll. 7, 22; 3:940 [581], Bodl. MS Heb. a 3, f. 13, ll. 39–40; 4:435 [745], INA D 55, f. 14*v*., l. 2; 4:632 [814], TS 12.28, l. 10; ʿAodeh, "Types of Vessels and their Ownership," 291. On the involvement of Roman women in water transport and ship owning, consult Scott, *Civil Law*, 4:202, Digest XIV, 1, 1, 16.

[27] Gil, *op. cit.*, 2:887 [294], ENA 1822 A, f. 9, ll. 20*r*, 5*v*.; 3:483 [446], ULC Or 1080 J 37*v*. (margin) ll. 1–2; 3:490 [448], ULC Or 1080 J 167, l. 14; 4:169 [654], TS 16.13, l. 23; 4:574 [789], AIU V A 70, l. 7*v*.; 4:670 [825], TS 8 J 19, f. 12, ll. 9–10; 4:676 [828], TS 13 J17, f. 24, l. 8.

[28] Ben-Sasson, *op. cit.*, 623 [125], ENA 1822 A, f. 9*v*., l. 4.

[29] Denia is said to be named after the Roman temple of Diana (Dianium). The origins of the town of Denia as such date back to the founding of a Greek colony called Hemeroskopeion, although in pre-Roman times Iberian settlements existed in the Montgo area. The urban adventure of the town started in the third-century B.C., when Dianium was founded by the Romans. In about 713 C.E., the Muslims took control of the stronghold. In 1013, Ṭāʾifa declared itself independent from the power of Cordoba, minting its own currency, a status it held until 1076, it attained a high cultural level within Al-Andalus. Denia was conquered in 1244 C.E. in the reign of James I by Pere Eiximen Carros.

[30] Ben-Sasson, *op. cit.*, 536 [108], TS 8 J 20, f. 2, l. 6; 554 [112], TS 12.372*v*., l. 17; Gil, *op. cit.*, 2:813 [273], Bodl. MS Heb. e 98, fs. 64–65*v*., l. 14. On the history of Mujāhid and his role in re-establishing the Islamic dominance over parts of the western basin of the Mediterranean, consult Clelia Sarnelli-Cerqua, *Mujāhid al-ʿĀmirī: Qāʾid al-Usṭūl al-ʿArabī fī Gharbiyy al-Baḥr al-Mutawassiṭ fī al-Qarn al-Khāmis al-Hijrī* (Cairo, 1961).

[31] Ben-Sasson, *op. cit.*, 388 [85], TS 13 J 19, f. 20, l. 8; Gil, *op. cit.*, 3:476 [444], ENA 2805, f. 26, (right margin) ll. 5–6; Constable, *Trade and Traders*, 122.

[32] Palermo was founded by the Phoenicians who arrived from Carthage in the eighth century B.C., and was given the name Ziz (flower). It entered Byzantine possession in 552 and was then thought of as an unimportant provincial capital. Palermo was conquered by the Arabs in 831 became capital of the independent emirate of Sicily. The equivalent of Cairo in Egypt and Cordoba in Spain, it then entered a period of prosperity. In this time, Palermo became the Eastern port to the West, and many mosques were built. In 1072, the Normans led by Robert de Hauteville brought Palermo under Norman rule.

Mahdiyya,[33] and Sicily (Palermo and Māzar);[34] Nāṣir al-Dawla Ibn Ḥamdān[35] of Egypt (who was the actual ruler of the country during 454–465/1062–1073) and his brother Fakhr al-ʿArab;[36] Ḥiṣn al-Dawla Ibn Ḥaydara Ibn Manzu the governor of Damascus (460–467/1068–1075),[37] Yaḥyā Ibn Tamīm,[38] and Sulṭān al-Dawla,[39] also engaged in shipping ventures on the Mediterranean.

Of Muslim judges who owned commercial vessels the Geniza letters mention Abū Muḥammad ʿAbd Allāh Ibn ʿAlī Ibn Abī ʿAqīl, the *qāḍī* of Tyre, who also ruled the city from 455/1063 to 481/1089,[40]

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[33] Al-Mahdiyya is a major port-city and the Fāṭimīd capital in Ifrīqiya was founded by and named after ʿUbayd Allāh al-Mahdī (297–322/909–934), the founder of the Fāṭimīd State, in the 5th of Dhul Qiʿda 303 A.H., May 10th, 916 and was inaugurated on February 20, 921. Among the most important constructions ordered by Imām al-Mahdī was the fortification of the peninsula. A defensive wall over 8 meters thick and defended by four tower bastions surrounded al-Mahdiyya. Built on a spur projecting over 1,400 meters into the sea, al-Mahdiyya was a palace city, seat of the central administration, a naval base and a place of refuge. See ʿAbd Allāh Muḥammad Ibn Muḥammad al-Idrīsī, *Nuzhat al-Mushtāq fi Ikhtirāq al-Āfāq* (Beirut: ʿĀlam al-Kitāb, 1989), 1:281–283; Yāqūt Ibn ʿAbd Allāh al-Ḥamawī, *Kitāb Muʿjam al-Buldān* (Beirut: Dār Ṣāder, 1967), 5:229–232.

[34] Gil, *op. cit.*, 1:553–556; 2:534 [182], TS 13 J 19, f. 29, l. 11; 2:804 [270], TS Arabic 30, f. 123, l. 5*c*; 3:118 [342], Mosseri IV, 28.1, l. 11; 3:418 [421], ENA 4100.5*v*., l. 7; 3:651 [494], TS 8 J 20, f. 2, l. 7; 3:715 [514], TS 8.26, l. 7; 4:323 [701], TS NS J 563, l. 7; 4:561 [785], Bodl. MS Heb. c 50, f. 19, l. 12.

[35] *Ibid.*, 3:260 [374], TS 12.226*v*., l. 28; 3:836 [553], Bodl. MS Heb. d 66, f. 81, l. 8; 3:842, 843 [556], TS 13 J 26, f. 8, ll. 14, 17, 20; 4:443 [748], Bodl. MS Heb. a 2, f. 20, l. 9; Goitein, *Mediterranean Society*, 1:310; ʿAodeh, "Types of Vessels and their Ownership," 286–287; Stanley Lane-Pool, *A History of Egypt in the Middle Ages* (London, 1968), 145–150.

[36] Ben-Sasson, *op. cit.*, 593, 596 [120], TS 13 J 26, f. 8, ll. 13, 22; Gil, *op. cit.*, 3:842–843 [556]; 4:278 [688], TS 13 J 23, f. 15, l. 16.

[37] Ben-Sasson, *op. cit.*, 54 [10], TS 10 J 4, f. 2, l. 4; 396, 404, n. 10 [86], TS 16.163*v*., l. 4; Gil, *op. cit.*, 4:440 [747].

[38] Gil, *op. cit.*, 3:454 [436], TS 8 J 25, f. 13, ll. 5, 7.

[39] *Ibid.*, 3:975–976 [595], ULC Or 1080 J 166, ll. 12–13.

[40] Ben-Sasson, *op. cit.*, 48 [9], Mosseri II, 128 (L 130), l. 21; 340 [76], TS 20.122*r*, l. 12, *v*., l. 26; 348 [77], TS 8 J 18, f. 10, l. 7; 396 [397], TS 16.163, l. 3; 463 [96], TS 20.71*v*., l. 17; 470 [97], TS NS J 12, ll. 13–14; 503 [103], TS 20.69, l. 29; 531 [107], BM Or 5542, f. 9*v*., l. 8; 4:539 [109], TS 13 J 16, f. 19, l. 8; 544 [110], ENA 2727, f. 38, l. 5; 548 [111], TS 8 J 22, f. 10, (upper margin) l. 7; 554 [555], TS 12.372*v*., l. 17; 584 [118], TS 13 J 15, f. 9, l. 7; Gil, *op. cit.*, 3:627 [487], TS 12.335*v*., ll. 13–14; 3:716 [514], TS 8.26*v*., l. 1; 3:809–810 [543], TS 13 J 17, f. 15, ll. 14–16; 3:824 [547], ENA NS 22, f. 1*v*., ll. 10–11; 4:149 [647], Gottheil and Worrell, 36, l. 21; 4:548 [780], TS AS 152.9, l. 4; *idem, Palestine during the First Muslim Period*, 1:344–346; ʿAodeh, "Types of Vessels and their Ownership," 287–288; Goitein, *Mediterranean Society*, 1:296.

Amīn al-Dawla Abū Ṭālib al-Ḥasan Ibn Muḥammad Ibn ʿAmmār (459–464/1067–1072), a Shīʿite *qāḍī* of Tripoli (Lebanon),[41] the founder of ʿAmmār emirate,[42] the *qāḍī* Ṣadaqa Ibn al-Ṣafrāwī,[43] as well as the son of the market superintendent (*Ibn ṣāḥib al-sūq*).[44]

The total number of Muslim state officials and royal personalities who owned commercial ships and fleets, however, never exceeded a small percentage of the proprietors; the largest single-group of ship owners were the merchants.[45] In fact, the eleventh century shipping industry was controlled by Muslim entrepreneurs namely Ibn al-Basmalī,[46]

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[41] Habitation of the site of Tripoli goes back at least to the fourteenth century B.C. but not until about the ninth century did the Phoenicians establish a small trading station there. Later, under the Persians, it was home to a confederation of the Phoenician city-states of Sidon, Tyre and Arados Island. Built on the trade and invasion route near the Abu Ali River, Tripoli's strategic position was enhanced by offshore islands, natural ports and access to the interior. Under Alexander the Great's Hellenistic successors, Tripoli became a naval shipyard. Evidence also indicates that it enjoyed autonomy at the end of Seleucid era. Under Roman rule, from Pompey's conquest of the area in 64–63, the city flourished and the Romans built several monuments here. The Byzantine city of Tripolis, which by then extended south, was destroyed, along with other Mediterranean coastal cities, by an earthquake and tidal wave in 551. After 635 Tripoli became a commercial and shipbuilding center under the Umayyāds. It achieved partial independence under the Fāṭimīd Dynasty when it developed into a center of learning. In the early twelfth century, the Crusaders besieged and finally entered the city in 1109. The resulting great destruction included the burning of Tripoli's famous library, the Dār al-ʿIlm, with its thousands of volumes.

[42] Gil, *op. cit.*, 2:381 [134], ULC Or 1080 J 291, (c) l. 7; 2:396 [139], TS Misc 25.133*v.*, l. 8; 3:627 [487], TS 12.335*v.*, l. 14; 3:706 [512], TS 12.388, l. 11; 3:822, 824 [547], ENA NS 22, f. 1, l, *v.*, ll. 7, 13; 4:183 [659], TS NS J 303 (*b*), l. 6; Ben-Sasson, *op. cit.*, 531 [107], BM Or 5542, f. 9*v.*, l. 8; 544 [110], ENA 2727, f. 38, l. 5; ʿAodeh, "Types of Vessels and their Ownership," 289–290. On the political and economic roles of the Ibn ʿAmmār dynasty in Tripoli and Egypt during the eleventh century, see ʿUmar ʿAbd al-Salām Tadmurī, *Tārīkh Ṭarāblus al-Siyāsī wal-Ḥaḍārī ʿabr al-ʿUṣūr* (Beirut: Muʾassasat al-Resālah, 1984), 337–383.

[43] Gil, *op. cit.*, 3:261 [375], TS 8 J 25, f. 11, l. 6; 3:265 [376], ENA NS 22, f. 25*r*, l. 17; 3:305 [385], TS 10 J 9, f. 5, l. 3; 3:544 [463], TS AS 152.7, l. 7; 3:706 [512], TS 12.388, l. 13; Ben-Sasson, *op. cit.*, 526 [106], Bodl. MS Heb. b 3, f. 22*v.*, l. 3.

[44] Goitein, *Mediterranean Society*, 1:322, TS 10 J 9, f. 18, l. 5; Gil, *op. cit.*, 3:471 [443]; 3:763 [528], ENA 2805, f. 21, l. 7.

[45] Goitein, *Mediterranean Society*, 1:311.

[46] Gil, *op. cit.*, 2:386 [135], TS Box J 1, f. 54, (*d*) 31; 2:545 [185], BM Or 5563 C, f. 19, l. 22; 2:547 [186], TS 8 J 18, f. 14, l. 7; 2:574 [194], TS 13 J 17, f. 11, l. 12.

Ibn Daysūr,[47] Ibn al-Ḥaffāz,[48] Ibn al-ʿŪdī,[49] Ibn al-Qayyim,[50] Abū ʿAlī Muḥammad Ibn Shablūn al-Shāmī,[51] Yasr al-ʿAttāl,[52] Abū al-Dhahab ʿAlī,[53] ʿUthmān al-Lakkī,[54] Abū al-ʿUlā Mufaḍḍal al-Ḥayfī (Haifa, Palestine) al-Tarjumān (or al-Tarājima),[55] Muḥammad Ibn

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[47] Ben-Sasson, *op. cit.*, 227 [55], TS 13 J 17, f. 11, l. 23; 230 [56], TS 10 J 19, f. 19, ll. 8, 21, 26; 234 [57], Bodl. MS Heb. d 66, f. 15, l. 18; 242 [59], TS 13 J 16, f. 23, l. 17; Gil, *op. cit.*, 2:709 [241], TS 13 J 14, f. 2, l. 12; 2:804 [270], TS Arabic 30.123 (c) l. 9; 3:51–52 [318], ENA 2727, f. 6 B*v.*, ll. 1–2; 3:135 [346], Mosseri IV 79, l. 7; 3:162 [353], TS K 25.250*v*, ll. 2, 5; 3:187 [361], TS 12.378, l. 1; 3:199 [364], TS 8 J 24, f. 10, ll. 6–7; 3:230 [369], TS 13 J 25, f. 9, l. 4; 3:269 [377], Bodl. MS Heb. b 3, fs. 19–20, l. 27; 3:485 [447], TS 8 J 27, f. 2, l. 12; 3:489 [448], ULC Or 1080 J 167, l. 6; 4:451, 452 [750], Mosseri IV 36*a* l. 15, *v.*, l. 4; 4:676, 678 [828], TS 13 J 17, f. 24, l. 10, *v.*, l. 3.

[48] Gil, *op. cit.*, 3:183 [359], TS K 25.265, ll. 17–18; 3:187 [360], TS AS 151.154*v.*, l. 1; 4:545 [779], ULC Or 1080 J 168, l. 5; 4:594 [797], ENA 2805, f. 7 B, l. 10.

[49] Ben-Sasson, *op. cit.*, 488 [101], TS 16.339, l. 3; 530 [107], BM Or 5542, f. 9, l. 9; 584 [118], TS 13 J 15, f. 9, l. 11; Gil, *op. cit.*, 3:168 [354], TS K 2.32, (*f*) l. 7; 3:173 [355], TS Arabic 30.179, (*c*) l. 18; 3:230 [369], TS 13 J 25, f. 9, ll. 3, 7; 3:487 [447], TS 8 J 27, f. 2*v.*, l. 2; 3:490 [448], ULC Or 1080 J 167, l. 7; 3:634 [489], ENA 2727, f. 38, 4; 3:706 [512], TS 12.388, l. 13.

[50] Gil, *op. cit.*, 3:184 [359], TS K 25.265, l. 23; 3:203 [364], TS 16.263*v.*, l. 13; 3:514 [452], TS Misc. 28.228*v.*, l. 25.

[51] Ben-Sasson, *op. cit.*, 292, 293 [68], TS 13 J 23, f. 18, ll. 6, 26; 395 [86], TS 16.163(I), l. 36; 590 [119], TS 8 J 24, f. 21*v.*, (right margin), l. 1; Gil, *op. cit.*, 2:745 [252], Westminster College Misc. f. 100, l. 9; 3:238 [372], TS AS 145.81, l. 3; 3:346 [396], TS 10 J 32, f. 10, l. 6; 3:640 [491], TS 10 J 20, f. 12, l. 14; 3:665 [495], ENA NS 1, f. 7 (L 43), l. 2; 3:668 [500], TS NS 338.95, (upper margin) l. 4; 3:706 [512], TS 12.388, l. 14; 3:834 [552], ENA NS 19, f. 25*r* (right margin) l. 5; 3:924, 925 [578], TS 10 J 5, f. 24, ll. 3, 8; 4:410 [738], TS 12.229, l. 16; 4:451 [750], Mosseri IV 36*a*, l. 5.

[52] Ben-Sasson, *op. cit.*, 585 [118], TS 13 J 15, f. 9*v.*, l. 5; Gil, *op. cit.*, 2:774 [258], Bodl. MS Heb. c 28, f. 33*v.*, l. 15; 3:11 [307], ENA 2805, f. 16 B, l. 6; 3:106 [337], ENA 2738, f. 6, l. 16; 3:137 [346], Mosseri IV 79*v.*, ll. 3–4; 3:605 [483], AIU VII E 18, l. 20; 3:617 [485], TS 12.545*v.*, l. 14; 3:660 [497], Mosseri VII 141*v.*, l. 1.

[53] Gil, *op. cit.*, 2:342 [122], TS 16.266, l. 14; 2:443 [151], Mosseri VII 155, l. 3; 2:445 [152], TS 8 J 28, f. 9, l. 3; 2:631–633 [216], ENA 3786, f. 1, ll. 7, 13, 14, 29–30, 33; 3:828 [549], TS 8 J 18, f. 10, ll. 8–9.

[54] Ben-Sasson, *op. cit.*, 544 [110], ENA 2727, f. 38, l. 5; Gil, *op. cit.*, 2:458 [156], ULC Or 1080 J 35, l. 35; 2:463 [158], Bodl. MS Heb. d 66, f. 15, l. 12; 3:98 [334], TS Misc. 28.240, l. 11; 3:119 [342], Mosseri IV 28(1)*v.*, l. 5; 3:139 [347], ULC Or 1080 J 36, l. 10; 3:192 [363], TS 16.264, l. 3; 3:199 [364], TS 8 J 24, f. 10, l. 12; 3:201 [364], TS 16.263, l. 24; 3:310 [386], TS Arabic 30.226*v.*, l. 4; 3:617 [485], TS 12.545*v.*, l. 20; 3:660 [497], Mosseri VII 141*v.*, l. 1; 3:706 [512], TS 12.388, l. 14; 3:780 [533], ENA 4100, f. 24 (right margin) ll. 10–11; 3:799 [539], BM Or 5566 B, f. 31, l. 25; 3:832 [551], ENA 2805, f. 17 B, l. 5; 4:594 [797], ENA 2805, f. 7 B, l. 8.

[55] Gil, *op. cit.*, 3:183, 184 [359], TS K 25.265, ll. 14, 18, 2; 3:485 [447], TS 8 J 27, f. 2, l. 9; 3:490 [448], ULC Or 1080 J 167, l. 14; 3:544 [463], TS AS 152.7, l. 5; 3:706 [512], TS 12.388, l. 11; 3:814 [544], PER H 130, l. 10; 3:834 [552],

'Abd al-Raḥmān al-Andalusī,[56] and al-Ishbīlī.[57] The most recent documentary publication of eleventh century Geniza accounts establishes that the overwhelming majority of ships' proprietors living in the realm of Islam around the Middle Sea were Muslims: Gil's collection of 846 business records 270 names of ship owners,[58] only six of which were *dhimmī*s, including three Jews: al-Yahūdī,[59] Ibn al-Sāmirī (Samaritan),[60] and Ma'mūn Ibn al-Ḥasan,[61] and four Christians: Ibn Marcus,[62] Zakkār al-Naṣrānī,[63] Maimūn al-Naṣrānī,[64] and most prominently Ibn al-Iskandar.[65] None of the above is intended to suggest, of course, that Christians played a negligible role in shipping and economic life, a time when they made up at least half the population in Islamic territories around the Mediterranean. Interestingly,

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ENA NS 19, f. 25, l. 21; 4:354 [713], TS 8 J 28, f. 8, l. 12; 4:571 [789], AIU V A 70, l. 15.

[56] Gil, *op. cit.*, 2:481–482 [163], TS 10 J 9, f. 26, ll. 18–20; 2:530 [181], TS 13 J 17, f. 3, l. 15; 2:534 [182], TS 13 J 19, f. 29, l. 11; 2:804 [270], TS Arabic 30.123, (*c*) l. 5; 3:118 [342], Mosseri IV 28(1), l. 11; 3:418 [421], ENA 4100. f. 5*v*., l. 7; 3:651 [494], TS 8 J 20, f. 2, l. 7; 3:715 [514], TS 8.26, l. 7; 4:323 [701], TS NS J 563, l. 7; 4:561 [785], Bodl. MS Heb. c 50, f. 19, l. 12.

[57] Ben-Sasson, *op. cit.*, 278 [65], Bodl. MS Heb. c 28, f. 61, l. 12; Gil, *op. cit.*, 2:888 [294], ENA 1822 A, f. 9, (c) ll. 1, 3; 3:51 [318], ENA 2727, f. 6 B*v*., l. 1; 3:486, 487 [447], TS 8 J 27, f. 2*r*., ll. 14–15 *v*., ll. 2, 4; 3:489 [448], ULC Or 1080 J 167, l. 6; 4:277 [688], TS 13 J 23, f. 15, l. 6; 4:677 [828], TS 13 J 17, f. 24, l. 25.

[58] Gil, *op. cit.*, 4:924–928.

[59] *Ibid.*, 2:633 [216], ENA 3786, f. 1, l. 33.

[60] *Ibid.*, 4:228 [669], TS Misc. 8.103*v*., ll. 35, 40.

[61] Bodl MS Heb a 3, f. 19.

[62] Gil, *op. cit.*, 3:490 [448], ULC Or 1080 J 167, l. 8.

[63] *Ibid.*, 3:184 [359], TS NS 338.92, l. 19; 4:519 [770], TS 8 J 18, f. 21, l. 4.

[64] *Ibid.*, 4:568, 569 [788], Bodl. MS Heb. a 2, f. 19, ll. 12, 30.

[65] *Ibid.*, 2:332 [118], ENA 3616, f. 29, l. 16; 2:339 [121], TS 10 J 11, f. 9, ll. 2–3; 2:385 [135], TS Box J 1, f. 54, (c) l. 24; 2:499 [172], Bodl. MS Heb. d 65, f. 5, l. 7; 2:724 [246], TS NS J 274*v*, l. 12; 2:894 [295], TS 24.40, l. 59; 3:135 [346], Mosseri IV 79, l. 11; 3:139, 140 [347], ULC Or 1080 J 36, ll. 10, 15; 3:168 [354], TS K 2.32, (f) l. 16; 3:183 [359], TS K 25.265, ll. 12–13; 3:196 [363], TS 16.264*v*., l. 21; 3:213 [365], TS 12.794*v*., l. 34; 3:345 [395], TS 18 J 3, f. 13, l. 42; 3:348 [396], TS 10 J 32, f. 10*v*., l. 1; 3:380 [408], Bodl. MS Heb. a 2, f. 18, l. 17; 3:411 [419], TS 10 J 20, f. 17, l. 7; 3:485, 487 [447], TS 8 J 27, f. 2*r*, l. 12, *v*., l. 2; 3:544 [463], TS AS 152.7, l. 3; 3:671 [501], TS 13 J 19, f. 9, l. 3; 3:676 [502], TS 8 J 19, f. 4, l. 14; 3:706 [512], TS 12.388, l. 10; 3:716 [514], TS 8.26*v*., l. 4; 3:824 [547], ENA NS 22, f. 1*v*., l. 16; 3:842, 844 [556], TS 13 J 26, f. 8, ll. 11, 20; 3:857 [561], DK 230 d + a, l. 26; 4:155 [650], ENA NS 2, f. 30, l. 6; 4:178 [656], ENA 2805, f. 18B*v*., l. 5; 4:628, 629 [813], TS 12.15, ll. 5, 9, 20; Ben-Sasson, *op. cit.*, 234 [57], Bodl. MS Heb. d 66, f. 15, l. 22; 470 [97], TS NS J 12, l. 10; 490 [101], TS 16.33*v*., l. 5; 501 [103], TS 20.69, l. 6; 540 [109], TS 13 J 16, f. 19, l. 12; 559 [113], TS 8 J 21, f. 2, (upper margin) ll. 6–7; 'Aodeh, "Types of Vessels and their Ownership," 295–296.

too, the Geniza reveals the contribution of Muslim women to the shipping industry: the trading vessels of al-Sayyida, mentioned above, sailed between the Tunisian, Sicilian, and Egyptian seaports.

Joint Ownership

A ship was normally owned by a religious institution or a single proprietor, and only exceptionally by two or more parties.[66] In the latter case, she was divided into shares, each partner owning one or more; a co-owner could own a quarter, half, or any percentage of ship.[67] This form of partnership was based on a concept of trusteeship entailing a reciprocal relationship among the shareholders. In general, where there were several partners, a co-owner could not legally bind the others by hiring out the ship to a particular person or employing her for a particular purpose since he was not regarded as their agent. To make a contract bind on them, he had to obtain actual authority to contract on their behalf. When one part owner with the authority of his co-owners entered into a contract for the use of the ship, they each became personally bound by it; each was jointly and severally liable for any contractual breach and had a right to contribution from the others for any damages that resulted.[68]

Whereas the N. N. does not mention any cases of joint or co-ownerships the Digest seems to limit the legal paradigm to the co-owners' contractual obligations and responsibility to the shippers. Early Islamic jurisprudence, on the other hand, was much more regulatory. It dealt firstly with altercations among the co-owners that

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[66] Partnership in a commercial vessel was not limited to people of the same faith. For instance, we encounter in the Geniza business letters evidence of ships owned by a Jew called Maḍmūn Ibn al-Ḥasan, who was a *nāzir* (superintendent) of a port, and a Muslim merchant from ʿAden called Bilāl Ibn Jarīr, who later became the general ruler of Aden. Their ship was in service for 20 years, from 1130 C.E. to 1149/50 C.E. See Goitein, *Letters*, 181–182 [37], Bodl MS Heb a 3, f. 19; Ranabir Chakravarti, "Ship-owning Merchants in the West Coast of India (c. A.D. 100–1500)," *Journal of the Economic and Social History of the Orient* 43 (2000), 45.

[67] Ṭāher (ed.), *Akriyat al-Sufun*, 45; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 235; Ibn Rushd, *Fatāwā Ibn Rushd* (Beirut: Dār al-Gharb al-Islāmī, 1987), 2:836; Rafiʿ, *Muʿīn al-Ḥukkām*, 2:528; Wansharīsī, *Al-Miʿyār*, 8:305–306, 308, 312.

[68] Khalilieh, *Islamic Maritime Law*, 39–40; Noble, "Principles of Islamic Maritime Law," 34–35; Ashburner, *op. cit.*, clxiii–clxvi; Scott, *op. cit.*, 3:139, Digest IV, 9, 7, 5; 4:202, Digest XIV, 1, 1, 13; Digest XIV, 1, 1, 14; Digest XIV, 1, 1, 25, Digest XIV, 1, 2, Digest XIV, 1, 3, Digest XIV, 1, 4, 1, Digest XIV, 1, 4, 2.

might result in dissolution of the partnership over payment for damage repairs. In such cases, the law required the expenses to be distributed in accordance with the share of each, *i.e.*, a co-owner had the option of maintaining his share by paying for his portion of the repairs. Otherwise, the jurists laid down two subsidiary precepts: (a) damage was to be assessed before any repair work was done, giving a co-owner the opportunity to sell his share(s) in the vessel before it was repaired; and (b) a co-owner who failed to pay for his portion of the repairs was required to sell the portion of his share(s) that would cover the payment due from him. In that case, his co-owner(s) had a first right of purchase,[69] and the value of a share was to be determined by maritime industry experts known in legal parlance of the time as "*ahl al-maʿrifa*."[70]

Of particular interest were cases in which one co-owner was transporting his own cargo while the other co-owner had nothing to load. The law decreed that the latter could neither prevent his partner from transporting, nor obliged him to pay the transportation fee. If a dispute arose that they could not settle, they ought to dissolve the partnership and sell the ship.[71] Moreover the shareholder had to reimburse his co-owners if he used their allocated space on board, according to the current rates of leasing at the port of origin.[72] In

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[69] Ṭāher (ed.), *op. cit.*, 45; Hady R. Idris, "Commerce maritime et *kirāḍ* en berberie orientale d'après un recueil inédit *fatwā*s médievales," *Journal of the Economic and Social History of the Orient* 4 (1961), 239; Noble, "Principles of Islamic Maritime Law," 37–39. A legal document from the Cairo Geniza [TS 18 J 4, f. 6, ll. 6–36], dated around 1110, which was presented before the *Nagīd* Mevorakh b. Saʿādya (born ca. 1040 and died December 2, 1111) deals with a complaint involving a partnership in a river-boat. The *Nagīd* was expected to issue his decision in this case, which we have not discovered yet. Unlike this case, letters of commerce from the Geniza usually contain names of shareholders, their professional behavior toward the lessees, and the description and volume of the shipment on board. See Ben-Sasson, *op. cit.*, 203–210 [51], TS 13 J 29, f. 9, l. 6; 453–459 [95], TS 20.4, l. 4; Gil, *op. cit.*, 2:339 [121], TS 10 J 11, f. 23, ll. 2–4: "Her proprietors are Ṭāher and his partner [*bi-ṣāḥibihi Ṭāher wa-sharīkihi*]"; 3:285 [380], TS 20.69, l. 29: ". . . on board the ship, which is jointly owned by Ibn Abī al-Wakīl and his co-partner the master Abī al-Faraj [*fī qārib Ibn Abī al-Wakīl al-ladhī nisfahu lil-shaykh Abī al-Faraj*]." This document was also published by Ben-Sasson, *op. cit.*, 503 [103]

[70] Ibn Bassām, *Nihāyat al-Rutba*, 148, 157; Ibn Mājid, *Al-Fawā'id*, 239; Kindī, *Al-Muṣannaf*, 21:153–154; Idris, "Commerce maritime," 236.

[71] Ṭāher (ed.), *op. cit.*, 45; ʿAbd Allāh Ibn ʿAbd al-Raḥmān Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt ʿalā mā fī al-Mudawwana min ghayrihā min al-Ummahāt* (Beirut: Dār al-Gharab al-Islamī, 1999), 7:346; Noble, "Principles of Islamic Maritime Law," 35–36.

[72] Wansharīsī, *Al-Miʿyār*, 9:117; Idris, "Commerce maritime," 236.

general it appeared that the rights of the owners were guaranteed, subject to everyone acting in good faith. Furthermore, besides being a part owner, a partner was entitled to act as a merchant agent [*ʿāmil al-qirāḍ*] paid both for transporting cargo and from his share in commercial transactions.[73] However, the law stated that if a partner did not participate in a transaction, he received only the transportation fee. The absence of any partner from a negotiation barred him from collecting a portion of the profit, even if local custom allowed it.[74]

The partnership contract could be legally nullified in cases of lack of confidence among the partners. In acting unilaterally, a co-owner violated the basic principles of the partnership: for instance, he could not carry out leasing transactions without his partners' authorization. To avoid nullification due to lack of confidence, the law required co-owners to cooperate with one another.[75]

On the basis of scant but invaluable legal data, we may outline the principles of co-ownership in Islamic law as follows. A partner has the right to load his part of the ship, but not to employ that part without the consent of his co-partners. If he loads his cargo in the partners' part, or carries an outsider's goods in his own part, he must pay the freight to the co-partners, proportionate to their shares. Hence a shareholder is bound to render an account to the co-owners and to give them their shares of every voyage he undertakes. Under certain circumstances, where he repairs damage to the ship without previously consulting his co-partners, the latter must pay the expenses commensurate with their shares. A partner can manage the ship alone and conclude contracts with the shippers on behalf of his partners, if they all acknowledge liability to the shippers.

Seamen: Their Employment, Welfare, and Status

1. *Definition of a "Seaman"*

The Digest defines a seaman as an employee hired to serve on board a ship for the purpose of navigating her from port to port.[76] The

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[73] Idris, "Commerce maritime," 235–236.

[74] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 235; Gil, *op. cit.*, 2:574 [194], TS 13 J 17, f. 11, l. 5.

[75] Burzulī, *Jāmiʿ Masāʾil al-Ḥukām*, 3:655; Wansharīsī, *Al-Miʿyār*, 8:305–306.

[76] Scott, *op. cit.*, 3:134, Digest IV, 9, 1, 2; 10:286, Digest XLVII, 5, 1, 1.

N. N. views a hired seaman as a "slave," in the language of the document, who has bound himself over to perform his duty faithfully and professionally on a ship.[77] Islamic law labels him as an *ajīr khāṣṣ*—meaning one hired by a contract of employment for a specific period of work—for a fixed sum, provided he commits no action defined as a transgression or an act of negligence.[78] Included in the above definition are the ship owner or his representative, the captain or ship's master, scribe/clerk, chief navigator, helmsman, watchmen, carpenter(s), seamen on deck, cook, servants, and armed personnel.[79] If the Roman, Byzantine, and Islamic legal definitions of a seaman are relatively similar, one may assume that seamen on the Middle Sea had similar rights and duties.

2. *Service Contract*

The actual conditions under which a seaman was employed on board are portrayed in an authentic Coptic contract of hire from the seventh century. With the exception of additional clauses that could be inserted in any crew agreement with the consent of both parties, contracts of employment were presumably of the same nature, style and content. Thus, in our crew agreement (Papyrus 144):

> I, John, the sailor, son of the late George of Shmoun, write to George the sailor,[80] son of Melas, likewise of Shmoun. Seeing that I have agreed to embark with thee as sailor upon the little ship Apa Severus, and (to receive) *hire*[81] of thee from today, the fifteenth of Parmoute[82]

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[77] Ashburner, *op. cit.*, 121, Appendix D:III.

[78] Ibn Nujaym al-Miṣrī, *Rasā'il Ibn Nujaym* (Beirut: Dār al-Kutub al-'Ilmiyya, 1980), 153–154; Noble, "Principles of Islamic Maritime Law," 74–77.

[79] Casson, *Ships and Seamanship*, 320–321; Khalilieh, *Islamic Maritime Law*, 42–47; McCormick, *Origins of the European Economy*, 415–418; Letsios, *Das Seegesetz der Rhodier*, 118–119, 128–129, 254. Articles 1–7 of Part II of the N. N. list the master, steersman, master's mate, carpenter, boatswain, cook, and ordinary seamen, who served on board the *ploion*. McCormick estimates the total number of crewmembers aboard medium vessels to be half a dozen, while larger ones carried a dozen. A similar team of officers and seamen probably managed and operated the Arabic *markab*.

[80] The term here signifies the person in charge of the ship, *i.e.*, shipmaster or ship owner.

[81] The term hire should signify rate of pay or a share of the profits rather than a fixed salary.

[82] Parmoute (Farmou or Baramouda) is the eighth month of the Coptic calendar, named after Renno, the god of severe wind or death. During this month the season of vegetation ends and the earth becomes dry. The Gregorian Calendar equivalent is April 9th to May 8th.

> of the year in which we now are, the tenth Indiction,[83] henceforth, until the fulfillment of its year, namely the month Paope,[84] in God's will, of the eleventh Indiction; now I therefore undertake to remain as sailor on this ship, in all freedom, without sloth or neglect. [It is agreed] that we will conceal nothing, one from the other, of what God shall bring to us; and we will give [each other] the proportion fixed from [the takings of] the Apa Severus, from today henceforth, until the fulfillment of its year. And if its year be fulfilled and we agree together, we will set sail again together. But if I wish to part from thee, while I am a sailor with thee upon the little ship, thereupon I will pay two gold *solidi* as fine, [all] that I have [being at thy disposal]. For thus it hath seemed good between us together, from henceforth, that we should make common cause and that I should embark with thee upon the little ship. For thy assurance, therefore, I have drawn up this agreement for thee and consent thereto by my signs. And I have begged other freemen and they have witnessed it, while I swear by God Almighty and by the health of them that rule over us, that I will observe [it], according to its terms. After the date and John's signature, those of two witnesses.[85]

Most contractual terms brought up by the parties are fundamental and are still part of crew agreements today. A contract of employment concluded between a ship owner and a captain is termed by contemporary legal authorities a one-crew agreement. Once the agreement assigned the captain to operate and serve on a particular vessel, as in John's case, he had to carry out the agreement on the Apa Severus, and neither contracting party could demand to serve on another craft. For instance, assuming that George owned more than one vessel, he could not demand that John serve aboard another ship without the latter's consent. The fact that John and George entered into a contract specifying the ship's name proves that seamen could also have been employed in a general or unnamed ship, as defined previously. The agreement took effect, not from the moment it was signed, but when the seaman commenced working on the Apa Severus. In this case, John was hired for one navigation season (15th Parmoute/24th April until Paope/early November) with a

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[83] A 15-year fiscal cycle adopted in the later Roman Empire, fixing the valuation of property to be used as a basis for taxation.

[84] Paope is the second month of the Coptic calendar. Named after Yee-pee or Ha-pee, the god of the Nile or of Thebes, who is also the god of vegetation, because in this month the earth becomes green with vegetation. Gregorian Calendar equivalent: October 11th to November 9th.

[85] Crum, *Catalogue of the Coptic Manuscripts*, 75–76, Pap. 144.

possible extension; the crew agreement could be renewed by mutual consent. The agreement also contains clauses pertaining to the employee's rights and duties. John promised to perform his duties professionally, manage the ship, and not leave her before the termination of his employment; otherwise, he "will pay two gold *solidi* as a fine." He further promised to be faithful and hand the profits and returns over to the ship owner at the end of the sailing season; in accordance with the contract terms, John would receive a share of the profits. Finally, John agreed, before two free witnesses, to honor and comply with the contract terms. Needless to say, contracts were written with two copies at least, one for the employer and the other given to the employee. Interestingly, the agreement stated the addresses of the contracting parties, as well as the ship's homeport. A crew agreement in Greek, dated from February 19th, 266, contains similar terms with minor changes.[86] It can be argued, then, that employers and employees followed established laws and local customs in formulating their contract terms.

3. *Forms of Employment*

Two forms of hire contracts prevailed in the Byzantine and Islamic empires: for fixed periods and for specific voyages. Following the first form, seamen were employed for a fixed period ranging from a few days to a navigation season or longer and, the crew agreement was extendable by mutual consent. It could begin either at the moment it was signed or when the seaman commenced his service, as seen in the seventh century seasonal agreement above. Therefore, both parties to the contract were required to fix commencement and expiry dates. If the employer and employee did not fix those dates, the contract would be considered void.[87] In the second form, seamen were employed for a voyage or voyages, with predetermined ports of origin and destination. Exact, or at least approximate, dates of departure had to be specified. And the employer could not compel

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[86] M.W. Haslam *et al.*, *The Oxyrhynchus Papyri* (London: Egypt Exploration Society, 1990), 57:132–137, Oxy. 3912.

[87] Ashburner, *op. cit.*, 121, Appendix D:I; Ṭāher (ed.), *op. cit.*, 13, 14; Saḥnūn Ibn Saʿīd al-Tanūkhī, *Al-Mudawwana al-Kubrā* (Cairo: Maṭbaʿat al-Saʿāda, 1323/1905), 4:409.

his employee(s) to sail in tempestuous weather, or when the sea was closed, or when the navigation season was about to end.[88]

4. *Wages*

Byzantine and Islamic judicial sources refer at length to the payment of wages and a debate centers around how payment is fixed. When is the seaman entitled to his wages? When he commences or completes his duties, or in installments? Does the seaman have to complete the voyage successfully and deliver the cargo safely at the destination to earn his wages? When does he lose his right to them?

Neither Byzantine nor Islamic law allowed seamen to be hired without fixed pay. The wages due them were fixed in the N. N. in Articles II:1–7, in which the rate of pay was determined by the seamen's place in the ship's hierarchy. The shipmaster or commander, who was not necessarily the vessel's owner, was entitled to two shares for his own wages, *i.e.*, twice as much as an ordinary seaman was paid. Where the shipmaster was the owner, he then collected the two shares besides what remain after expenses from the freight charges. The pilot, who not only directed the ship's course but also steers her, received one share and a half, as did the master's mate, boatswain, and carpenter. Ordinary seamen were eligible for one share each, and the pantry boy, *i.e.*, the cook, was entitled to only half a share.[89] Jackson has termed this method of wage payment, which prevailed in Byzantium from the seventh century onwards, a profit-sailing arrangement. Its essential feature was the proportional division of the venture's profits between owner and crew. Crews were hired for shares in the profit, their earnings varying according to the venture's success.[90] Nevertheless, Letsios and Ashburner argue that Articles III:5 and III:46 may conceivably refer to fixed wages.[91]

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[88] Ṭāher (ed.), *op. cit.*, 14–15; Wansharīsī, *Al-Miʿyār*, 8:301; Sulaymān Ibn Muḥammad al-Mahrī, *Al-Minhāj al-Fākhir fī ʿIlm al-Baḥr al-Ẓākhir* (Damascus: Maṭbaʿat al-Saʿāda, 1970), 105–106; Khalilieh, *Islamic Maritime Law*, 52.

[89] Ashburner, *op. cit.*, 57–59, Articles II:1–7; Letsios, *Das Seegesetz der Rhodier*, 130–131, 254; Freshfield, *Manual of Later Roman Law*, 205; Justice, *General Treatise*, 78–80; Dareste, "*Lex Rhodia*," 28.

[90] Richard P. Jackson, "From Profit-Sailing to Wage-Sailing: Mediterranean Owner-Captains and their Crews during the Medieval Commercial Revolution," *Journal of European Economic History* 18 (1989), 606.

[91] Letsios, *Das Seegesetz der Rhodier*, 130–131, 258, 266; Ashburner, *op. cit.*, clxvii–clxviii.

From the seventh century onwards, ship owners and seamen in the Mediterranean evidently seemed to have adopted a profit-sailing system where a seaman was not paid a salary but rather a share of the profits. The fact that early Islamic jurisprudential inquiries frequently refer to the profit-sailing method proves that ship owners and seamen living in the realm of Islamic Mediterranean apparently concluded employment contracts for part of the profits despite the tacit legal prohibition.[92] However, of the few circumstances where Muslim law doctors legalized this method of payment, it was in wartimes. Following the Arabic maxim "necessity makes forbidden acts lawful," Muslim jurists approved of the delivery of ships to those who operated them in lieu of part of the profit only when conveyed food supplies from North Africa to Islamic maritime frontiers separated by sea from the mainland, such as Andalusia and other Islamic Mediterranean islands.[93]

Like the Roman *locatio conductio operarum* (payment of fixed wages),[94] the Islamic system of wage sailing was principally based on the Prophetic tradition that states: "Whoever hires an employee, let him hire at a fixed wage . . . [*man ista'ajara ajīran fal-yua'ājirhu bi-ajrin ma'lūm* . . .]."[95] This method of payment was the dominant form of

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Article III:46 states: "If those on board are lost or die, let the captain pay their annual wages for the full year to their heirs."

[92] Ṭāher (ed.), *op. cit.*, 46–47; Saḥnūn, *Al-Mudawwana*, 4:409–410; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:34; Māwardī, *Al-Muḍāraba* (Cairo: Dār al-Anṣār, 1984), 121; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 232; Abū 'Abd Allāh Muḥammad Ibn Muḥammad al-Ḥaṭṭāb, *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl* (Beirut: Dār al-Kutub al-'Ilmiyya, 1995), 7:518; Wansharīsī, *Al-Mi'yār*, 8:224. Letsios calls our attention to the existence of a fixed wage in the Byzantine legal system. In accordance with this guideline, the payment dues were paid for a certain period, normally for the duration of a ship journey. However, the profit-sharing payment seems to have been the most prevalent method in the Byzantine world. See Letsios, *Das Seegesetz der Rhodier*, 131–132, 133: "die Bezahlung durch Gewinnbeteiligung scheint ja das massgebende System für den N. N. gewesen zu sein."

[93] Muḥammad Ibn Muḥammad Ibn Sarrāj al-Andalusī, *Fatāwā Qāḍī al-Jamā'a Abū al-Qāsim Ibn Sarrāj al-Andalusī* (Abū Dhabī: al-Majma' al-Thaqāfī, 2000), 198–200.

[94] Scott, *op. cit.*, 4:201, Digest XIV, 1, 1, 7; Casson, *Ships and Seamanship*, 314–321; Jackson, "From Profit-Sailing to Wage-Sailing," 606; Letsios, *Das Seegesetz der Rhodier*, 150–151.

[95] Ṭāher (ed.), *op. cit.*, 13, 14; Saḥnūn, *Al-Mudawwana*, 4:409; Abū al-Ḥussein Aḥmad Ibn Muḥammad al-Qudūrī, *Mukhtaṣar al-Qudūrī* (Karachi, 1379/1960), 116; 'Āmir Ibn 'Alī al-Shammākhī, *Īḍāḥ* (Beirut, 1970), 3:531, 550; Muḥammad Ibn Ḥārith al-Khushanī, *Uṣūl al-Futyā fī al-Fiqh 'alā Madhhab al-Imām Mālik* (Tripoli: Al-Dār al-'Arabiyya lil-Kitāb, 1985), 145–146; Abū Bakr Muḥammad Ibn Muḥammad Ibn 'Āṣim, *Tuḥfat Ibn 'Āṣim* (Alger, 1882), 582–583; Wansharīsī, *Al-Manhaj al-Fā'iq*

hire in water transport, since it involved minimal risk to employees. Muslim seamen engaged in international and/or domestic ventures did not assume risks, since they were paid in advance, while the ship owner assumed the full risks of the venture. Therefore contrary to the N. N., which in most charters fixes the seamen's shares in relation to the venture's profits, the A. S. does not standardize tariffs and allowances, but enables seamen to fix wages individually with their employers. Undoubtedly the seaman's wage was associated with his rank and function on the ship.[96]

The N. N. ordained that seamen must be paid in full upon discharge from the ship, on condition that they had fulfilled their tasks loyally and efficiently and the venture was successful. Nonetheless, the treatise includes three special cases in which employers had to pay the seamen's wages in full, irrespective of task completion. The first relates to seamen who perished in the course of their duties. Article III:46 ruled that, if the dinghy goes adrift and is lost with her crew, who die at sea, the employer must pay their annual wages for the full year to the estate.[97] The second situation relates to a calamity that befell a seaman performing his duties at the captain's instructions. The last circumstance refers to a seaman "sent by the captain for wood or elsewhere goes with comrades and is left behind."[98] By all accounts, ship owners had to deliver the full wage payment to the seaman's estate upon the ship's return to her homeport. Even if the legal and documentary evidence prove that wages were paid in full upon the discharge of seamen, the terms of the crew agreement could dictate otherwise. Unlike Byzantine financial arrangements, Islamic law ordained that the amount due to a seaman had to be paid prior to the departure date. Muslim employers had to

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wal-Manhal al-Rā'iq wal-Ma'nā al-Rā'iq bi-Ādāb al-Muwaththiq wa-Aḥkām al-Wathā'iq (Ribāṭ: Wizārat al-Awqāf wal-Shu'ūn al-Maghribiyya, 1997), 282–284; Khalilieh, *Islamic Maritime Law*, 50.

[96] Abu Safieh, *Bardiyyāt Qurra Ibn Sharīk*, 269, Papyrus 1393. Early eighth century C.E. Arabic papyri from Islamic Egypt reveal that the annual income of an ordinary seaman was almost 5¾ *dīnār*s, in addition to a half *dīnār* for living and personal expenses, whereas a shipwright and carpenter earned an annual salary of 11½ *dīnār*s. The wages of Egyptian seamen and shipbuilders/carpenters were almost equivalent to those earned by their Byzantine counterparts. See Letsios, *Das Seegesetz der Rhodier*, 131–132.

[97] Justice, *General Treatise*, 112; Ashburner, *op. cit.*, 118; Freshfield, *Manual of Later Roman Law*, 205; Dareste, "*Lex Rhodia*," 27; Letsios, *Das Seegesetz der Rhodier*, 266.

[98] Ashburner, *op. cit.*, 121, Appendix D:II.

abide by the Prophet's commandment and pay employees before they commenced work.[99] Thus, paying the seamen's wages in advance was obligatory even if the local custom allowed them to be withheld until the end of the voyage. Furthermore, if the contracting parties agreed to a condition authorizing a ship owner to withhold the amount payable to his employee until the latter was discharged from the ship, then the contract between them was null and void.[100] Byzantine and Islamic laws alike allowed payments of wages to seamen in cash or in kind.

Wages were subject to increase or deduction. Aside from shipping charges, maritime customs in the Mediterranean required shippers to pay a gratuity to the seamen at the commencement or end of the voyage.[101] The N. N. required shippers to grant crews a gratuity if they performed their duties faithfully and professionally and acted with "zeal and goodwill."[102] The gratuity, invariably labeled by the Islamic *fatāwā* and Geniza as *barṭīl*,[103] *hiba*,[104] *maḥabba*,[105] or

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[99] Muslim jurists outlawed in principle the profit-sharing system. Nevertheless, in adverse circumstances, especially in wartimes, they tended to sanction it if the commonwealth necessitated so. Abū al-Qāsim Ibn Sarrāj al-Andalusī (d. 848/1444) approved of the profit-sharing arrangement during the Inquisition. As the Arabic proverb says "necessity know no laws" during these adverse circumstances when seamen assume risks upon themselves from Christian naval forces, Muslim jurists permitted the profit-sailing method if the ships carry provisions and weapons for Muslims living across the sea. See Wansharīsī, *Al-Miʿyār*, 8:224.

[100] Ṭāher (ed.), *op. cit.*, 17, 18; Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:642. A ship owner must pay wages in full even if an enemy captures the crew while the vessel is still anchored in the port of origin, except if the contract stipulates otherwise.

[101] Kenyon *et al.*, *Greek Papyri in the British Museum*, 3:220, Pap. 948. The freight contract stipulates that the lessee from Arsinoe gives a jar of wine for libation as a gratuity to the captain upon his arrival at the intended destination.

[102] Ashburner, *op. cit.*, 121, Appendix D:III.

[103] Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:648–649; Wansharīsī, *Al-Miʿyār*, 8:300–301; Minhājī, *Jawāhir al-ʿUqūd*, 1:293–294; Gil, *op. cit.*, 2:803–805 [270], TS Arabic 30.123, b, l. 11, c, ll. 6, 13, d, ll. 3, 7; 2:806 [271], TS Arabic 30.127, b, ll. 2, 6; 2:808 [272], TS J 2, f. 66, b, l. 6; 2:817–818 [274], TS Box K 15.53, a, l. 16, b, ll. 2, 4; 2:913 [300], Heidelberg Pap. Heb. 17, a, l. 22; 3:69 [325], TS Arabic 54.88, l. 4; 3:102, 104 [336], TS Arabic 30.92, b, l. 5, d, ll. 9, 11; 3:192 [363], TS 16.264, l. 3; 3:200 [364], TS 16.263, l. 13; 3:261–262 [375], TS 8 J 25, f. 11, ll. 5, 7, 8, 9, 10, 11, 17; 3:263, 265 [376], ENA NS 8, f. 4*r* l. 8 and ENA NS 22, f. 25*r*, l. 13; 3:311 [387], BM Or 5544, f. 6, l. 12; 3:334 [392], TS 10 J 9, f. 3, l. 16; 3:349 [397], ULC Or 1080 J 119, a, l. 8; 3:455 [436], TS 8 J 25, f. 13, l. 8; 3:604 [483], AIU VII E 18, l. 12; 3:612 [484], TS NS 321.57*v*., l. 25; 3:615–617 [485], TS 12.545*v*., ll. 3, 6, 7, 10, 11, 14, 15, 20; 3:623 [486], ULC Or 1080 J 79*v*., l. 9; 3:800 [539], BM Or 5566 B, f. 31*v*., l. 19; 4:148–149 [647], Gottheil and Worrell, 36, ll. 8, 24; 4:568 [788], Bodl MS Heb a 2, f. 19, l. 13; 4:612 [805], Gottheil and Worrell, 14, l. 13; Ben-Sasson, *op. cit.*, 221 [54], Bodl. MS Heb.

shōḥad (Heb.),[106] was given so the crew would take care of the cargo at all stages of the maritime venture. Its rate varied in accordance with the cost of living, time, volume and quality of the shipment, and the duration of the voyage.[107]

Another occasion where a crewmember could legally seek additional pay was for activity involved in salvaging jetsam and flotsam. The pecuniary compensation to seamen for salvage operations, as set up by the Rhodian lawyers, was calculated on the basis of success achieved and risks involved. For instance, if a ship was wrecked on the high seas, a salvager should receive one-fifth of the value of what he managed to recover and bring safely to shore.[108] However, remuneration rose if cargoes were salvaged from the sea floor.[109] The reimbursement never exceeded the value of the salvaged property, and a shipper retained title to cargo if he did not intentionally relinquish it. Islamic jurisprudence, however, views salvage as a religious and moral duty; like the Digest, the right of salvage was generally confined to persons who are strangers to the doomed vessel. However, a small number of *fuqahā'* required ill-fated shippers and seamen to negotiate the terms of pecuniary reward prior to the salvage operation.[110]

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d 65, f. 17*v*., l. 1. Although the gratuity was often paid in cash, we occasionally read in the Geniza about travelers presenting "a basket of sweetmeats" to the shipmaster. See Gil, *op. cit.*, 2:458 [156], ULC Or 1080 J 35, ll. 34–36; Goitein, *Mediterranean Society*, 1:488, note 11. On the gratuity paid to porters Beirut during the Mamlūk period, see Wansbrough, "Venice and Florence in the Mamluk Commercial Privileges," 505–506, 520: "And when the galleys arrive at the harbor of Beirut there is a gratuity of 30 *florins* on each galley for the superintendent."

[104] Gil, *op. cit.*, 3:64 [323], TS NS 154.160, l. 4; 3:104–105 [336], TS Arabic 30.92, d, ll. 12, 14; 3:180 [358], TS NS 338.92, l. 8.

[105] *Ibid.*, 2:817, 819 [274], TS Box K 15.53, a, l. 13, c, l. 12.

[106] *Ibid.*, 4:706 [240], TS NS 320.3, l. 18.

[107] Burzulī, *Ǧāmiʿ Masā'il al-Aḥkām*, 3:650; Wansharīsī, *Al-Miʿyār*, 8:300–301: "The merchants customarily must pay gratuity to the seamen after loading their cargo onto the ship or after unloading it. If they fulfilled the task, they would be rewarded, regardless of whether the leasing contract was nullified or not. . . . Whatever falls within the category of gratuity differs from time to time, sometimes it is lower and sometimes it is higher."

[108] Articles III:45 and III:46; Ashburner, *op. cit.*, 117–118; Dareste, "*Lex Rhodia*," 27; Pardessus, *Lois maritimes*, 1:256–257; Justice, *General Treatise*, 112; Freshfield, *Manual of Later Roman Law*, 205; Letsios, *Das Seegesetz der Rhodier*, 138, 266.

[109] Ashburner, *op. cit.*, 112, 117–119; Dareste, "*Lex Rhodia*," 23, 27; Justice, *General Treatise*, 109, 112; Letsios, *Das Seegesetz der Rhodier*, 265–266.

[110] See further chapter six, 208–215.

The earnings of seamen were subject to adjustment and increase whenever a change in the trading itinerary unexpectedly prolonged the journey, or if they were engaged in successful commercial transactions. If employment extended beyond the time limit of the crew agreement, seamen had to be compensated for every additional day on the basis of the original contract terms or current tariff at their homeport.[111] Concerning commercial dealings, seamen who engaged in maritime loans, *chreokoinōnia*, and *qirāḍ*, normally collected the earnings fixed by the hire contract, as well as a certain percentage of profits accrued from the trading transactions. That particular portion of the proceeds was payable after the return of the capital and profits to the investor.[112]

Conversely, wages could also be subject to deduction. Under the principle of "general average," a portion of the seamen's salary could be deducted due to the jettisoning of all or part of the ship's contents due to an imminent and inevitable danger to humans, vessel, and cargo. In fact, Article III:9 of the N. N. allows the inclusion of the seamen's personal effects, as well as the payment of wages, in the calculation of the general average. It places a financial limit on the value of luggage belonging to the captain, master, officer, and common seamen; crewmembers appear to contribute in accordance with their place in the vocational hierarchy and revenues.[113] The reason for including wages can be explained by the fact that seamen were hired for a fixed percentage or shares of the profits. If they share the profits, as established by Articles II:1–7, then they must share in the losses incurred by the ship and her contents. By contrast, Islamic law excludes the seamen's private belongings and wages from being averaged.[114] The prohibition against including their salaries existed because the seamen's earnings are termed private capital assets, which are excluded from averaging calculations. However, the

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[111] Article III:25 of the N. N. requires the cargo owner to pay the rations of the crew for ten days if the time limit fixed by the contract expires. Note the seamen's entitlement to extra wages is not linked to the earning established in the employer's contract. Rather, the shipper must pay each seaman that extra ration promptly or before departing from the port of embarkation at the latest. See Ashburner, *op. cit.*, 103; Dareste, "*Lex Rhodia*," 19; Justice, *General Treatise*, 101; Freshfield, *Manual of Later Roman Law*, 201; Khalilieh, *Islamic Maritime Law*, 52.

[112] This topic is extensively covered in chapter seven, 231–246.

[113] Ashburner, *op. cit.*, 87; Justice, *General Treatise*, 91; Dareste, "*Lex Rhodia*," 11; Letsios, *Das Seegesetz der Rhodier*, 259.

[114] Ṭāher (ed.), *op. cit.*, 32, 33.

only circumstance in which a seaman is held liable to compensate a shipper is when the former jettisons cargo when the ship is not in imminent peril, and without first consulting those concerned.[115] In addition, a crewmember who serves as the *commendator*'s agent is not liable for merchandise cast into sea under perilous conditions. The responsibility for loss is solely that of the investor, if the agent acted professionally and in good faith.[116]

5. *Accommodation and Welfare*

The N. N. made two references to the diet of seamen though it did not prescribe the quality and quantity of food. Article III:22 required the shipmaster to supply seamen with food and water: "Let the captain take nothing but water and provisions. . . ."[117] Article III:25 required merchants to provide seamen with drink and victuals if they were delayed in loading.[118] By contrast, however, the A. S. and a great majority of *fatāwā* inquiries never referred to this issue. Although, early eighth century papyri showed that the admiral (*amīr al-baḥr*) in charge of the military fleet and coastal frontiers had to see to supplies and provisions for shipwrights, artisans, seamen and warriors for their diet consisting of bread, butter, wine, oil, and salt.[119] Providing victuals and drink for the crew was most likely a pan-Mediterranean customary practice. Therefore, the lack of written evidence should not be interpreted to mean that ship owners did not supply their crews with food and drink in the realm of Islam. The presence of cooks on board seagoing Byzantine and Islamic commercial ships is

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[115] Muḥammad Ibn Idrīs al-Shāfiʿī, *Al-Umm* (Beirut: Dār al-Maʿrifa lil-Ṭibāʿa wal-Nashr, 1973), 6:86; Abū al-Ḥasan ʿAlī Ibn al-Ḥussein al-Sughdī, *Al-Nutaf fī al-Fatāwā* (Beirut: Muʾassasat al-Resālah, 1984), 2:791–792; Muwaffaq al-Dīn Abū Muḥammad ʿAbd Allāh Ibn Aḥmad Ibn Qudāma, *Al-Mughnī* (Cairo: Dār Hajar lil-Ṭibāʿa wal-Nashr, 1986), 12:550; Qarāfī, *Al-Furūq*, 4:11; Kindī, *Al-Muṣannaf*, 18:59; Nawawī, *Rawḍat al-Ṭālibīn*, 7:191; Shammākhī, *Īḍāḥ*, 3:610.

[116] Ṭāher (ed.), *op. cit.*, 47.

[117] Ashburner, *op. cit.*, 102; Pryor, "Byzantium and the Sea," 87–95 [his discussion focuses primarily on the supply of the Byzantine naval fleets with water]. The *Consulate of the Sea* states that the shipmaster must provide his seamen with a menu of meat, bread, wine, cheese, onions, raisins, figs, sardines and other fish during their service. See Stanley S. Jados, *Consulate of the Sea and Related Documents* (Alabama: The University of Alabama Press, 1975), 79.

[118] Ashburner, *op. cit.*, 103; Letsios, *Das Seegesetz der Rhodier*, 262.

[119] Bell, *Greek Papyri in the British Museum*, 4:64–67, Pap. 1392, Pap. 1393; Abu Safieh, *Bardiyyāt Qurra Ibn Sharīk*, 259, Pap. 1354; 266–269, Pap. 1392, Pap. 1393; Fahmy, *Muslim Naval Organization*, 107–109.

a sufficient basis to hypothesize that they were hired primarily to prepare meals for the crew. In addition to providing food supplies, maritime tradition also required ship owners to designate storage space for seamen's personal effects and a small quantity of goods, free of charge.[120] Finally, tenth century literary evidence from Egypt shows maritime customs in the Islamic world seemed to have required ship owners to outfit their crew and staff with uniform dress called *jibāb* (sing. *jubba*, a long outer garment, open in front, with wide sleeves),[121] or *tubbān*, (a small under-drawer or a brief),[122] to distinguish them from shippers and passengers.

6. *Misbehavior*

The law sanctioned a deduction from seamen's wages for violating disciplinary regulations. Unprofessional conduct on the part of seamen entitled ship owners not only to deduct from their earnings, but also to seize their private property, if loss and harm incurred to the ship, cargo, and/or humans were higher than the wages fixed in the crew agreement. That law certainly did not tolerate disciplinary offences, including theft and fighting. The N. N. referred to the judicial outcomes of robbery in various charters. For instance, Article III:1 of the N. N. related to a thief, not necessarily a seaman, who stole anchors from a ship moored in port or on a beach. If the thief was convicted, the law condemned him to corporal punishment, besides twofold restitution. Article III:2 applied to seamen who stole anchors of another vessel anchored in the port at the command of their captain. It ruled that if it was conclusively confirmed that the captain ordered the robbery, he would be held liable for the forfeiture and would have to make good the loss to the ship and those on board. However, according to Article III:2, if anyone, including seamen, stole the ship's tackle or any of her equipment such as tackle, boat, sails, canvas, or the like, the thief had to pay twofold

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[120] Ashburner, *op. cit.*, clxxiv; McCormick, *Origins of the European Economy*, 427; Baghdādī, *Al-Ifāda wa'l Ftibār*, 189; Nukhaylī, *Al-Sufun al-Islāmiyya*, 42. This space is known in Arabic as *khunn*, a place in the ship's hull where seamen store their personal effects.

[121] Abū ʿAlī Muḥassin Ibn Abī al-Qāsim al-Tanūkhī, *Al-Faraj baʿda al-Shiddah* (Cairo: Dār al-Ṭibāʿa al-Muḥammadiyya, 1955), 1:388.

[122] Yedida K. Stillman, *Arab Dress from the Dawn of Islam to Modern Times: A Short History* (Leiden: E.J. Brill, 2000), 50.

restitution if convicted. Whereas the previous Article refers to robbery of the ship's rigging and equipment, Article III:3 presented the legal consequences of a theft committed by a crewmember from a shipper or a passenger by orders of the captain. In such a case, the captain had to make twofold restitution to those who were robbed, while the seaman who committed the robbery would receive a hundred lashes. However, if the seaman committed the theft on his own initiative and was caught or convicted by witnesses, he would be grievously tortured and beaten, especially if the stolen object was gold, and he had to make restitution to those who were robbed.[123] Regardless of whether or not the crewmember committed the theft from the shipper, the latter, as established in the Digest, has the right to sue the ship owner. This right stems from the lading contract negotiated between the shipper and ship owner, which stipulates safekeeping and transportation of the cargo.[124]

Robbery could occur because an untrustworthy captain and seamen were employed. Article III:8 stated that, if the employees set sail and made off with the ship and her contents, the possessions, movable, immovable and self-moving, of the offenders should be seized and sold to refund the value of the ship with damages and charges. If the value of such properties and possessions did not suffice to make good the loss, the offenders had to be hired out to work as servants and pay compensation out of their earnings until they gave full satisfaction for the damage they caused, upon returning into their dominion, *i.e.*, their port of origin. To avoid legal altercations, then, Rhodian lawyers advised depositors, shippers, and even ship owners under Article III:12 to make deposits of merchandise, gold, ships, or anything else of value with trustworthy seamen, in writing and before three witnesses.[125] In addition to risking fines and

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[123] Ashburner, *op. cit.*, 77–81; Dareste, "*Lex Rhodia*," 7; Justice, *General Treatise*, 87–88; Freshfield, *Manual of Later Roman Law*, 195–196; Letsios, *Das Seegesetz der Rhodier*, 128, 141, 211, 258.

[124] The issue regarding the ship owner's liability for damages caused by seamen, servants, and slaves on board his vessel is well addressed in the Fourth Book of the Justinianic Digest, especially Digest IV, 9, 1, 3, Digest IV, 9, 3, 1, Digest IV, 9, 3, 3, Digest IV, 9, 4, 1, Digest IV, 9, 5, Digest IV, 9, 5, 1, Digest IV, 9, 6, Digest IV, 9, 6, 1, Digest IV, 9, 6, 2, Digest IV, 9, 7, Digest IV, 9, 7, 2, Digest IV, 9, 7, 3, Digest IV, 9, 7, 4, Digest IV, 9, 7, 5, Digest IV, 9, 7, 6. See Scott, *op. cit.*, 3:135–139.

[125] Ashburner, *op. cit.*, 83–85; Dareste, "*Lex Rhodia*," 9; Justice, *General Treatise*, 89; Freshfield, *Manual of Later Roman Law*, 196–197; Letsios, *Das Seegesetz der Rhodier*,

lost wages, a seaman who steals may risk his freedom and become a slave. If a master does not order the slave-seaman to steal, but a theft is committed and then the slave-seaman runs away, "the theft and the flight and the death are to be made up by the master out of his wages."[126]

Article III:5 of the N. N. forbade fighting and ruled that if a quarrel arises among seamen, it must be waged with words rather than with physical violence. If one seaman strikes another on the head and wounds or hurts him, the assailant will have to pay the victim's bill for medical treatment, besides his wages during his incapacity for work. Article III:7 further ordained that if a master or shipper or any of the crew beats a person with his fist and blinds him, or kicks him and a rupture ensues, the aggressor must pay the physician's bill, twelve gold pieces to the sufferer for the loss of an eye and ten gold pieces for causing a rupture. If the injured person dies, the aggressor shall be held responsible for the death. In another statute, the compilers of the N. N. made a clear distinction between aggression and retaliation. Article III:6 stated: If the crew quarrel and one wounds another with a stone or a stick, and the person retaliates against the aggressor, the retaliator shall be considered to have acted under compulsion. If the aggressor dies and is proved by witnesses to have struck the first blow, either with a stone or log or axe, the retaliator shall be exonerated; for the aggressor suffered what he wished to inflict.[127] One must note that the Christian seamen of Islamic Syria, Palestine, and Egypt recognized the disciplinary laws of Rhodes for centuries. A literal Arabic translation of the Rhodian regulations on discipline came into existence in the twelfth century, when Gabriel Ibn Turaik, the Patriarch of the Church of Alexandria 1135–1145, compiled his canons.[128] The promulgation of the Christian Arabic Ecloga in later centuries proves that *dhimmīs* managed their communal and religious affairs in Islamic environments unhampered by local or central authorities.

127–128, 198–199, 259, 260; Stefen Leder, *Die arabische Ecloga* (Frankfurt: Forschungen zur byzantinischen Rechtsgeschichte, 1985), 116–119, Articles 28:10–13.

[126] Ashburner, *op. cit.*, 122–124, Appendix D:III, IV.

[127] Ashburner, *op. cit.*, 85–86, 93–94; Dareste, "*Lex Rhodia*," 9–13; Justice, *General Treatise*, 90, 94–95; Freshfield, *Manual of Later Roman Law*, 197, 198; Letsios, *Das Seegesetz der Rhodier*, 142, 213, 258–259.

[128] Letsios, "Sea Trade," 218–225; Leder, *Die arabische Ecloga*, 114–119, Articles 28:1–7.

The A. S. does not lay down explicit disciplinary rules that seamen must observe. Implicitly, however, it orders them to carry out their duties professionally, observe discipline and cooperate with the captain on board the ship. Violation of the disciplinary rules signifies, first of all, annulment of the crew agreement.[129] Two factors may explain the lack of comprehensive coverage of specific disciplinary regulations in the A. S. First, the treatise exclusively deals with maritime commerce and trade, and its chapter on "Hiring Seamen for Ships" focuses on the employment of crew, payment of wages and the circumstances in which seamen can breach their agreement. Second, the *Qur'ān* and jurisprudential sources of all periods deal at length with disciplinary infractions, though no legal distinction is made between offenses on land and at sea. In other words, theft, fighting, unlawful relationships and crimes that occur at sea are judged as if they had taken place on land.[130] Furthermore, regardless of the consequences of violations of discipline that a freeborn seaman may commit, a shipmaster has no legal authority to enslave him or to treat him as a slave.[131]

One might get the impression that Byzantine shipmasters were vested with more jurisdictional authority than their Muslim counterparts and were entitled to sentence violators on the spot. That was not the case. Violators were most likely turned over to Byzantine civil judicial authorities at the nearest port, or at the destination, or upon return to the homeport, where sentences were most likely issued in compliance with the N. N. In short, most, if not all crimes and wrongdoings, were settled in Byzantine courts rather than aboard ships. In this sense, Byzantine judges followed their Roman predecessors in distinguishing between the rules governing discipline at sea and those applicable on land.[132] Muslim shipmasters also enjoyed overriding authority on board their vessels in matters of discipline. Nevertheless, where an unlawful act was committed by a crewmem-

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[129] "The validity of the contract for leasing ships and hiring seamen . . . depends on the professional behavior of the crew [*istiqāma*]." The *istiqāma* means responsible professional behavior of seamen, *i.e.*, to obey the captain's instructions, not to provoke arguments with his co-seamen and passengers, and to take care of the cargo and the vessel's contents. See Ṭāher (ed.), *op. cit.*, 14.

[130] Khalilieh, *Islamic Maritime Law*, 149–161; Noble, "Principles of Islamic Maritime Law," 89–90. Both studies widely cover the subject from various aspects, therefore re-addressing it would certainly be redundant.

[131] Ibn Qudāma, *Al-Mughnī*, 12:549–550.

[132] Scott, *op. cit.*, 4:211, Digest XIV, 2, 9.

ber or passenger, the authority of a shipmaster was restricted to temporary imprisonment of the offender until the ship anchored at the nearest port, where an Islamic courthouse was then found, or until the ship returned to her homeport.[133]

As previously stated, any injury a crewmember caused made him liable to indemnify the injured person. Similarly, where cargo was lost or damaged through the act or oversight of a crewmember in the navigation or management of the ship, or in the loading, carriage or discharge of her cargo, the negligent party was liable for compensation to the shipper. Islamic and Byzantine laws agree that the seaman incurs liability if he commits a wrongful or negligence act, unless it is not established that he has done so.[134]

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[133] Wansharīsī, *Al-Miʿyār*, 8:304–305; Idris, "Commerce maritime," 238; *idem*, *Berbérie orientale*, 286; Goitein, "Jewish Trade," 237, TS 13 J 17, f. 11, ll. 11–14; Khalilieh, *Islamic Maritime Law*, 149–150; Noble, "Principles of Islamic Maritime Law," 90–92; Muḥammad Ḥamīdullāh, *Muslim Conduct of State* (Lahore: Ashraf Press, 1961), 122–123. The only Islamic legal reference to shipmasters empowered to supervise the punishment of offenders is found in a 695/1296 Malaysian Code on the law of the sea. Like the Roman and Byzantine legal systems, Islamic maritime customs in the Indian archipelago distinguished between theft, adultery, and other crimes that occur on the sea, and similar occurrences on land. This can be attributed to differences in applications of Islamic customs in the Mediterranean Sea and the Indian Ocean. See Raffles, "Maritime Code of the Malays," 80–83; Richard Winstedt and Patrick E. de Josselin de Jong, "The Maritime Laws of Malacca," *Journal of the Malayan Branch of the Royal Asiatic Society-Singapore* 29/3 (1956), 52–53, 58.

[134] Ṭāher (ed.), *op. cit.*, 43; Saḥnūn, *Al-Mudawwana*, 4:494–495; Shāfiʿī, *Al-Umm*, 6:86; Muḥammad Ibn Aḥmad al-Sarakhsī, *Al-Mabsūṭ* (Cairo: Maṭbaʿat al-Saʿāda, 1906), 16:10; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 15:447–448; 16:76–77; Wansharīsī, *Al-Miʿyār*, 8:332–335; Ibn Qudāma, *Al-Mughnī*, 7:432; Shammākhī, *Īḍāḥ*, 3:602–609; Kindī, *Al-Muṣannaf*, 18:62; Ṭūsī, *Tahdhīb*, 7:216–217; *idem*, *Al-Nihāya fī Mujarrad al-Fiqh wal-Fatāwā* (Beirut: Dār al-Kitāb al-ʿArabī, 1970), 447–449; Noble, "Principles of Islamic Maritime Law," 170–185; Khalilieh, *Islamic Maritime Law*, 48–49, 68–70, 87; Christides, "Raid and Trade," 83, 85. Warnings against seamen's fatigue and negligence appear again and again in Arabic navigational literature, travel accounts, Islamic jurisprudence, and Cairo Geniza documents. This was also the custom in the Indian Ocean, Red and Arab Seas, and the Persian Gulf. The famous Arab pilot Ibn Mājid, *Al-Fawāʾid*, 364, writes: "At the night take care lest you leave the ship without a *sanbūq* out or lest you find yourself with no equipment dependent on [*māda*], anchor or plumb-line. If you see anything of the reef or the shoals under the water, then stay where you are and make for the land in the beginning of the [next] day. If you fear that your anchor (grapnel) will remain in the depths, connect the anchor to the 'iron' (bower) and use the *sanbūq*." As for the Byzantine and Christian maritime laws, see Articles III:10, III:26, III:27, III:31, and III:38; Ashburner, *op. cit.*, 91, 105–106, 108, 112; Freshfield, *Manual of Later Roman Law*, 197, 201, 202, 203; Justice, *General Treatise*, 93, 102, 104, 109; Dareste, "*Lex Rhodia*," 19, 21, 23; Letsios, *Das Seegesetz der Rhodier*, 206, 259–260, 262–263, 264; Leder, *Die arabische Ecloga*, 116–117, Article 28:8. The N. N. appears more comprehensive than the Digest, although they had some common principles, especially with reference

7. *Duty in Times of Peril*

Part of the seamen's duty is to operate the ship professionally and faithfully, endangering neither ship nor contents, and to defend them against hostile attacks. Despite political enmities, people and merchandise moved freely around the Mediterranean.[135] With a few exceptions, political boundaries never formed an obstacle to their free movement, either.[136] Only during wartime and acute political disturbances were the visits of foreigners limited in duration or confined to certain localities. The Mediterranean, divided as it was between a Christian North and a Muslim South, eventually recovered much of its economic unity through the activity of merchants and traders. The real threats to merchant vessels were bad weather and piracy. Thus, to prevent attacks by enemy and pirate ships, and by bandits lurking along the coasts, merchantmen sailed in convoys. Documentary evidence from the Islamic world shows that provincial governments provided armed guards and a naval escort, and allowed commercial vessels to anchor in some coastal fortresses in case of attack. In the absence of an escort and armed guards, seamen were required to defend their ship against enemy and pirate assaults.[137] As a result, captains and crews had to avoid sailing into places infested by thieves or pirates.[138] Lastly, when a ship foundered and was about to sink,

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to negligent captain and crews, in which case shippers did not have to contribute for damage to the vessel.

[135] Muslim geographers divided the Mediterranean Sea into three great regions: (a) "the East," namely Egypt and the Muslim countries of the Levant, (b) "the Muslim West," al-Maghrib, comprising all North Africa west of Egypt, including Muslim Sicily, and Andalusia, and (c) "the Land of the Romans," *al-Rūm*, originally designating Byzantium, but used more vaguely for Christian Europe.

[136] S.D. Goitein, *Studies in Islamic History and Institutions* (Leiden: E.J. Brill, 1968), 299–301, remarks that the unity of the Mediterranean world was disrupted only when the Islamic countries were taken over by outside intruders, mostly from Central Asia and the Caucasus, who had no share in its tradition. Furthermore, he assumes that three positive factors made for the unity of the Mediterranean world and the freedom of movement within it. First, the law was seen as personal and not territorial, *i.e.* an individual was judged according to the law of his community or even his sect, rather than that of the territory in which he happened to be. Second, the bourgeois revolution of the eighth and ninth centuries, made merchants conspicuous participants in the thriving mercantile civilization, as trade made for freedom of movement. Third, all the Mediterranean countries held a strong cultural tradition in common, dating back to ancient civilizations.

[137] Kindī, *Al-Muṣannaf*, 18:55–56; H.S. Khalilieh, "Security Protection and Naval Escort during the Tenth and Twelfth Centuries Islamic Mediterranean," *Graeco-Arabica* VII–VIII (1999–2000), 221–232; McCormick, *Origins of the European Economy*, 409–415, 428–430.

[138] N. N., Articles III:4 and III:15; Ṭāher (ed.), *op. cit.*, 19–20, 22; Abū ʿAbd

or about to be boarded by pirates, captain and crew were the last to abandon her.[139]

8. *Termination of Service*

A seaman could not desert his post before his employment period expired. The legal outcomes of desertion might require a seaman to repay his employer the amount he received in full or in part. Or he might have to repay the whole amount, plus the fine established by the contract of hire, as we read above in the seventh century crew agreement.[140] Lastly, he might be penalized and forced by law to complete his term of duty as specified in the contract.[141] The A. S., however, is not explicit regarding employees who leave the ship before their term of service expires although, it forbids seamen from acting unilaterally if such conduct would inflict harm on their employers. In fact, a seaman can decide for himself only when it is justifiable, *i.e.* if he falls ill, or a ship is not seaworthy, or human and natural perils render travel by sea impractical. Even then, the contracting parties should submit their case to judicial authority.[142] Compelling reasons authorize seamen in most cases to breach the contract and leave. But, if the ship is still on the high seas, seamen must sail to the closest safe port; this rule also applies to cases where the contract expires while the ship is still at sea. Generally speaking, a crewmember's breach of contract justifies a deduction from his wages.

While the N. N. does not shed much light on the termination of the seamen's service, early Islamic jurisprudence sources define the circumstances under which the crew agreement can be breached. In principle, Islamic law prohibits seamen from doing so unilaterally or

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Allāh Muḥammad al-Raṣṣāʿ, *Sharḥ Ḥudūd Ibn ʿArafa* (Beirut: Dār al-Gharb al-Islāmī, 1993), 2:525.

[139] Buzurg Ibn Shahriyār, *The Book of the Wonders of India*, ed. and trans. by G.S. Freeman-Greville, (London, 1981), 16: "All of us captains are bound by oaths. We are sworn not to expose a ship to loss when it is still sound and its hour not yet come. All us captains, when we board a ship, stake our lives and destiny on it. If the ship is saved, we remain alive. If it is lost, we die with it."

[140] Crum, *Catalogue of the Coptic Manuscripts*, 75–76, Pap. 144.

[141] Ashburner, *op. cit.*, 121, Appendix D:I: "If he [a seaman] wishes to leave before the time is expired, let him receive seventy lashes and so he is to sail." Identical regulations are found in the Islamic maritime codes of the Malays. See Raffles, "Maritime Code of the Malays," 68–69.

[142] Ṭāher (ed.), *op. cit.*, 14–15.

before the contract expires except in case of: (a) an unseaworthy vessel,[143] (b) unfavorable weather conditions, (c) ambiguity of contract terms,[144] (d) illness,[145] (e) shipwreck,[146] or (f) sale of a vessel.[147] It is important to note that the last two cases apply only to seamen hired for a particular rather than a general ship.

Passengers: Entitlements and Obligations

1. *Definition of a "Passenger"*

A person accommodated on a ship—regardless of whether he did or did not accompany his own or another's merchandise or paid his passage and/or the freight for his possessions, or not[148]—was called a passenger. Except for emergencies and contractual obligations,[149] a sea traveler did not have to perform navigational or technical duties with respect to the ship herself.[150] The ship's master and scribe/clerk were responsible for the safety of passengers and their effects. Also, the ship's scribe had to record the passengers' personal identity, the quantity and nature of their effects and merchandise and their ports of origin and destination in the cargo book, as well as their shipboard accommodation.[151]

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[143] Kindī, *Al-Muṣannaf*, 21:153–154.

[144] Saḥnūn, *Al-Mudawwana*, 4:409; Ṭāher (ed.), *op. cit.*, 14.

[145] Raffles, "Maritime Code of the Malays," 75–76; Winstedt and Josselin, "Maritime Laws of Malacca," 57.

[146] Ṭāher (ed.), *op. cit.*, 16.

[147] Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:447; Ṭāher (ed.), *op. cit.*, 52; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Qarāfī, *Al-Dhakīra*, 1:355; Minhājī, *Jawāhir al-'Uqūd*, 1:94–96, 293–294.

[148] The traveler had to pay the freight charges though he could be exempted from the fare if the ship owner(s) so chose. See Scott, *op. cit.*, 3:137, Digest IV, 9, 6; Letsios, *Das Seegesetz der Rhodier*, 89, 101–102; Ṭāher (ed.), *op. cit.*, 33.

[149] Scott, *op. cit.*, 3:138, Digest IV, 9, 7, 2.

[150] Following this principle, ship's operators, crews, and servants who earned their living at sea, were not categorized as sea travelers.

[151] Ṭāher (ed.), *op. cit.*, 37; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 229; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 104–105; Khalilieh, *Islamic Maritime Law*, 46, 56, 79, 80; Gil, *op. cit.*, 4:149, Gottheil and Worrell, l. 24; Jados, *Consulate of the Sea*, 64–65, Articles 114, 115. On the presence of scribes aboard Islamic ships during the early eighth century C.E., consult Abu Safieh, *Bardiyyāt Qurra Ibn Sharīk*, 273, Papyrus 1341, l. 8 (Maria, the clerk in charge of the ship cargo). The absence of a single reference to scribes in the N. N. should not be understood to mean that Byzantine mer-

2. *Diet and Accommodation*

Besides the ship's seaworthiness and fares, a sea traveler had to consider his on board accommodation and make the necessary provisions for himself prior to departure.[152] As in the ancient world, Byzantine and Islamic cargo vessels provided neither food nor services for the traveling merchants and other passengers. In addition to clothing, a voyager had to provide his own food and equipment for bathing and sleeping—from pots and pans to mattresses, basins and bedding.[153]

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chantmen did not have such professional clerks on board. If the *grammateus* (clerk or secretary of a ship) was already known to the seamen of Classical Greece, then it is unreasonable to dismiss the presence of scribes aboard Romano-Byzantine large and oversized merchantmen. See Casson, *Ships and Seamanships*, 307.

[152] Some Muslim jurists warned their fellow passengers to learn about the identity of crewmembers as well as about their accommodation aboard. Kindī states that "whoever intends to travel on a ship must learn with certainty about the ship owner, but not from people who are in frequent contact with him (*man arāda rukūb al-safīna wa-lā yaʿrif ṣāḥibahā illā bi-khabar man lā yaʿrifahu . . .*)." See Kindī, *Al-Muṣannaf*, 18:53; 21:153–154. It behooved the passenger to assess the ship owner's character and abilities before the charter contract was endorsed in order to "feel assured (*iṭmiʾnānat al-qulūb*)." "Feeling assured" seems to mean believing there would be no unpleasant behavior on the part of the captain or crew during the voyage. An objective impression of the ship owner's personal background had to derive from "outside sources," *i.e.*, from people not in frequent contact with him. Obviously, information about the ship owner from his own circle was considered unreliable. An identical practice was known to the Mediterranean polities, who instituted it as a principle in their legal codices: *i.e.*, Digest XIV, 1, 1, urges those who intend to travel on a ship to be reliably informed about the character of the owner. Islamic law recommends that a traveler inquire about the technical state of the ship in detail and about her crew "not from people in frequent contact with him [them]," for they will never say the truth. See Scott, *op. cit.*, 4:200. Whereas Article III:11 of the N. N. states: "When merchants are hiring ships, let them make precise inquiry from the other merchants who sailed before them before putting in their cargoes, if the ship is completely prepared, with a strong sailyard, sails, skins, anchors, ropes of hemp of the first quality, boats in perfect order, suitable tillers, seamen fit for their work, good seamen, brisk and smart, the ship's sides staunch. In a word, let the merchants make inquiry into everything and then proceed to load." See Ashburner, *op. cit.*, 91–92; Justice, *General Treatise*, 94; Freshfield, *Manual of Later Roman Law*, 197–198; Dareste, "*Lex Rhodia*," 11.

[153] Scott, *op. cit.*, 3:135, Digest IV, 9, 1, 6; 3:137, Digest IV, 9, 4, 2; 4:208, Digest XIV, 2, 2, 2; Rougé, *Recherche*, 263; Lionel Casson, *Travel in the Ancient World* (Baltimore: The Johns Hopkins University Press, 1994), 153–156; McCormick, *Origins of the European Economy*, 410; Ashburner, *op. cit.*, cl; Ṭāher (ed.), *op. cit.*, 31–33; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Ibn Salmūn, *Al-ʿIqd al-Munzzam*, 2:3; Minhājī, *Ǧawāhir al-ʿUqūd*, 1:94–96; Ibn al-Mughīth, *Al-Muqniʿ fī ʿIlm al-Shurūṭ*, 242–244; Marrākishī, *Wathāʾiq al-Murābiṭīn wal-Muwaḥḥidīn*, 471; Kindī, *Al-Muṣannaf*, 18:53–54; Tanūkhī, *Al-Faraj baʿd al-Shiddah*, 1:388–389; Muḥammad Ibn Aḥmad Ibn Jubayr, *The Travels of Ibn Ǧubayr*, trans. R.J.C. Broadhurst (London, 1952), 325, for the Arabic version,

Assigning accommodation was the prerogative of the shipmaster or his representative.[154] A passenger could not choose his accommodation except if the leasing terms so specified.[155] The ship's manager had to allocate a space for each traveler to sleep, pray, and store personal effects and food. The N. N. allocates a space three cubits long by one cubit wide (corresponding approximately to 1.80 × 0.60 m./6 × 2 feet) for a shipper and an ordinary passenger, who was allowed to bring with him two men-servants, provided he paid their passage.[156] As for women travelers, the N. N. degrades them by assigning them only one-cubit space, and a child not fully grown is entitled to a half a woman's space.[157] Interestingly, Islamic jurisprudential sources do not define the exact space assigned for a traveler on Islamic commercial ships. Nevertheless, Muslim jurists required ship owners to set aside enough space for conducting prayers.[158] And, contrary to the Byzantine law, designated passenger space on Islamic ships was associated with body size, not age or sex.

The space reserved for passengers, their effects, and their victuals seems unrealistic. Accommodation was probably linked to socio-

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see *idem*, *Riḥlat Ibn Jubayr* (Beirut: Dār Ṣāder, 1959), 13; Goitein, *Mediterranean Society*, 1:316; *idem*, "The Tribulations of an Overseer of the Sultan's Ships," (Arabic) and *Islamic Studies in Honor of Hamilton A.R. Gibb*, ed. George Makdisi (Cambridge: Harvard University Press, 1965), 275, 280, TS 24.78, ll. 49–53; *idem*, *Letters*, 334, Mosseri, L 101; DK XI, ll. 22–23.

[154] Goitein, *Mediterranean Society*, 1:312. The ship owner's representative served as agent as well as purser. He concluded agreements with the shippers and decided in which part of the hold the shipment would be placed. He was in charge of loading and unloading of the goods.

[155] Except for transoceanic vessels, supercargoes, cruisers, and ferries for pleasure and entertainment, which were outfitted with cabin, compartments, promenades, baths, and lounges, most vessels had only a deck or two. Hence passengers were accommodated either in the open or under temporary shelters. Ṭaḥāwı, *Al-Shurūṭ al-Ṣaghīr*, 1:266–267; Qarāfī, *Al-Dhakhīra*, 1:355; Minhājī, *Jawāhir al-ʿUqūd*, 1:95; Khalilieh, *Islamic Maritime Law*, 26; Casson, *Ships and Seamanship*, 180–181.

[156] Letsios, *Das Seegesetz der Rhodier*, 129–130.

[157] Articles II:8, II:9, and II:13; Ashburner, *op. cit.*, 59–61; Justice, *General Treatise*, 80–81; Freshfield, *Manual of Later Roman Law*, 206; Dareste, "*Lex Rhodia*," 28–29; Letsios, *Das Seegesetz der Rhodier*, 127, 254, 255; Rougé, *Recherche*, 263. The Digest notes the legal status of a newborn child, absolving the parents from paying fare, though the child occupies a certain space. See Scott, *op. cit.*, 5:86, Digest XIX, 2, 19, 7.

[158] ʿAbd Allāh Ibn Yāsīn al-Shamarānī, *Isʿāf Ahl al-ʿAṣr bi-Aḥkām al-Baḥr* (Riāḍ: Dār al-Waṭan lil-Nashr, 1999), 207–214, 222–228; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 1:444–445; Ibn al-Ukhuwwa, *Maʿālim al-Qurbā*, 324; Khalilieh, *Islamic Maritime Law*, 163. The average space a worshipper could occupy is six feet long and two feet wide. This space allowance is comparable to that fixed in Article II:9 of the N. N.

economic status and personal relationship with the owner, so that the latter could allot convenient, spacious places for permanent clients and affluent shippers. Furthermore, the ship's structural design and capacity, number of passengers, quantity of cargo, and distance between embarkation and debarkation points might have been central in assigning shipboard space. Fewer passengers and less cargo, a longer voyage, and a well-designed, roomy vessel could increase the space allotted to travelers and their personal baggage.

Whether women were separated from men on Byzantine ships remains vague. Although the Digest refers to women ship owners[159] and the N. N. clearly fixes the space designed for them,[160] neither source depicts how to place women on board. By contrast, Islamic religious ethics discourage socializing between men and women. Women traveling by sea was a practice negatively viewed, because it necessitated some degree of interaction, unless the ship contained a separate section for women.[161] The unwillingness of Muslim doctors of law to permit women to travel by sea may have resulted from concern over propriety. The *Sharīʿa* expressed disapproval, except if the sexes were segregated, and the law recommended that women sail on multi-level vessels. Al-Māwardī (364–450/974–1058) urged *muḥtasib*s to ensure that large and roomy ships have separate toilets installed for women "so that they are not exposed to view when they need to use them."[162] However, one surmises that a well-connected

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[159] Scott, *op. cit.*, 4:202, Digest XIV, 1, 1, 16.

[160] Ashburner, *op. cit.*, 61, Article II:13; Justice, *General Treatise*, 81; Freshfield, *Manual of Later Roman Law*, 206; Dareste, "*Lex Rhodia*," 29; Letsios, *Das Seegesetz der Rhodier*, 255.

[161] Māwardī, *Al-Aḥkām al-Sulṭāniyya*, 257: "If they (*i.e.*, ship owners) carry both men and women, a partition should be installed between them"; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 2:434–435: "I dislike women sailing on the *Ḥajj* (pilgrimage to Makkah) . . . for fear that they may reveal themselves improperly [*ʿawratihunna*]"; Ibn al-Ukhuwwa, *Maʿālim al-Qurbā*, 324, writes: "If they (*i.e.*, ship owners) carry women, they must set a partition between them and the men." Supercargoes and decked ships seemed to have special sections for women. For instance, the middle floor of the *Cocca*, a type of Islamic commercial ship, was designed to carry women, maid-servants, and slaves. Again, ship owners had to segregate between male and female slaves though they were transported on the same level. Minhājī, *Jawāhir al-ʿUqūd*, 1:95. Further details on the capacity of Islamic ships in the Mediterranean see Pryor, "Medieval Muslim Ships of Pisa," 104–105; Muḥammad Ibn al-Qāsim al-Nuwayrī, *Kitāb al-Ilmām bil-Iʿlām fi-mā Jarat bi-hi al-Aḥkām wal-Umūr al-Muqḍiya fi Waqʿat al-Iskandariyya* (Hyderabad: Osmania Oriental Publications Bureau, Osmania University, 1969), 7 (index): 146–148.

[162] Māwardī, *Al-Aḥkām al-Sulṭāniyya*, 257.

woman of the upper classes, accompanied by a *maḥram*[163] or her husband, could hire a first class cabin, where she could also store an elegant wardrobe.

Muslim jurists grappled with the issue of whether Muslim passengers and pilgrims could sail aboard Christian vessels. While one opinion discouraged it, the second permitted it, if the voyage was for religious and educational purposes. The third allowed them to do so, if the passengers were sure that they would be neither harassed nor humiliated *en route* and if the Muslim governor at the port of departure was powerful enough so that the Christian powers obeyed him.[164] The *dicta* promulgated by these jurists did not apply to vessels of *dhimmī*s operated in the realm of Islam. In fact, a Geniza business letter shows that the vessels of al-Yahūdī, Ibn al-Sāmirī, Ibn Marcus, Zakkār al-Naṣrānī, Maimūn al-Naṣrānī, and Ibn al-Iskandar transported Muslim pilgrims and passengers of all sexes and ages.

3. *Boarding*

Loading and boarding could not take place without the prior approval of the captain,[165] and passengers were permitted to board only after technical inspection of the ship.[166] The captain's duty to provide safe embarkation for passengers began from the time of boarding. For example, if a passenger was hurt when boarding a ship, the captain had to pay his medical expenses.[167] As a result, passengers were obliged to follow the captain's instructions when they awaited boarding on the pre-boarding area.[168] Once aboard, the passenger had to

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[163] *Maḥram* literarily means everything entitled to reverence, respect, honor, or defense, in a person. In Islamic law the term signifies unmarriageable, as a degree of consanguinity precluding marriage.

[164] Wansharīsī, *Al-Miʿyār*, 1:432–436; H.S. Khalilieh, "The Legal Opinion of Mālikī Jurists regarding Andalusian Muslim Pilgrims Travelling by Sea during the Eleventh and Twelfth Centuries C.E.," *Mediterranean Historical Review* 4 (1999), 59–69; Muḥammad A. Bazzāz, "Ḥawl Naql al-Baḥriyya al-Masīḥiyya li-Ḥujjāj al-Gharb al-Islāmī," in *L'occident musulman et l'occident chrétien au moyen age*, ed. Mohammed Hammam (Ribāṭ, 1995), 81–92.

[165] Ibn Mājid, *Al-Fawāʾid*, 28, 239.

[166] Kindī, *Al-Muṣannaf*, 18:53: "Once the ship was set to sail the passenger is not allowed to board unless he seeks the permission of the ship owner."

[167] Khalilieh, *Islamic Maritime Law*, 54–55.

[168] Captains had to supervise and assess the passengers' behavior throughout the journey in order to avoid complications. Ibn Mājid writes: "Look thoroughly at all the passengers and the crew and assess them carefully, then you will recognize any

"remain" in his/her assigned location so as not to annoy fellow passengers or damage delicate cargo. Passenger movement on board was further restricted to seeking the captain's advice or access to the water tank: access to the caboose was limited to the cook, and the hold to the shipmaster and scribe. However, passengers could walk around, inasmuch as they did not annoy their fellow travelers, seamen, or, if they did not cause damage to the shipments or other passengers' private belongings.[169]

4. *The Carrier's Liability for Passengers' Belongings*

As previously noted, the ship owner had to allocate space for passengers' personal effects and food, provided that the quantity of provisions did not exceed the needs of the voyage. If, however, the passenger carried a commercial supply, the ship owner had the right to charge additional freight.[170] All personal effects, such as bedding, clothing and utensils, had to be recorded in the cargo book so that, in case of jettison, they would be treated like other cargo and included in the calculation of the general average.[171] According to the N. N.,

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evil in them and be prepared for it." See Ibn Mājid, *Al-Fawā'id*, 245. The Andalusian jurist Ibn ʿAbdūn advised ship owners and captains not to transport suspicious passengers of the following groups: "mercenaries of barbarian origins, black slaves, and people of ill repute." Ibn ʿAbdūn, *Seville musulmane*, 64.

[169] Article II:10; Justice, *General Treatise*, 81; Ashburner, *op. cit.*, 61; Freshfield, *Manual of Later Roman Law*, 206; Dareste, "*Lex Rhodia*," 29; Letsios, *Das Seegesetz der Rhodier*, 126–127, 254; Kindī, *Al-Muṣannaf*, 18:53–54; Simcha Assaf, *Texts and Studies in Jewish History* (Jerusalem, 1946) (Hebrew), 136; Goitein, "Portrait of a Medieval India Trader," 460.

[170] Article II:12; Ashburner, *op. cit.*, 61; Justice, *General Treatise*, 81; Freshfield, *Manual of Later Roman Law*, 206; Dareste, "*Lex Rhodia*," 29; Letsios, *Das Seegesetz der Rhodier*, 126–127, 254; Casson, *Travel in the Ancient World*, 153; Goitein, *Mediterranean Society*, 1:315–317; Gil, *op. cit.*, 3:1 [304], Bodl. MS Heb. b 3, f. 17, l. 9, dated approximately to 1060s, describes how a passenger accompanying a shipment, not only paid for his own effects, but also for the small basket he took with him that contained items intended for commercial purposes. Some local maritime customs in the Muslim world enabled passengers to launder their garments, but they could not spread them out on the bow without the captain's permission. See Kindī, *Al-Muṣannaf*, 18:55.

[171] Scott, *op. cit.*, 3:137, Digest IV, 9, 4, 2; 4:208, Digest XIV, 2, 2, 2; Article III:9; Ashburner, *op. cit.*, 87; Letsios, *Das Seegesetz der Rhodier*, 259; Constable, "Problem of Jettison," 213; Chowdbaray-Best, "Ancient Maritime Law," 86–88; Ṭāher (ed.), *op. cit.*, 32; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 236; Qarāfī, *Al-Dhakhīra*, 5:487; Wansharīsī, *Al-Miʿyār*, 8:298. On the inclusion and/or exclusion of private possession in the general average, see below chapter four, 157–159. Passengers were advised to deposit precious goods with the ship's captain.

passengers were also advised to deposit valuable baggage, whether intended for commercial purposes or private use, with the ship's master.[172]

5. *Discipline*

The ship's master, who had to observe good order in all stages of the journey, treated disciplinary offenses committed by passengers on the spot. Islamic law required him to hand over a thief with his stolen property to the port superintendent, who served as a *qāḍī*. Judicial authorities on land, rather than the captain or ship owner, judged the case and imposed punishment at the port of destination.[173] The Digest also entitled shippers to sue owners of vessels if goods received for safekeeping were subsequently stolen by a seaman, passenger, or other person: carriers too had to protect passengers' property from theft as well as from damage.[174] Less informative, though similar to the Digest, is the N. N., which entitled passengers and shippers to bring an action against the captain if they had lost goods and properties after the captain received them for safekeeping.[175] The ship's master/captain was authorized to preserve order and discipline until the ship anchored in port, in order to ensure the safety of the vessel and the persons and property on board. After that, offenders, whether crew or passengers, were summoned before the judicial authorities.

6. *Religious Rituals*

Passengers and pilgrims had the right to perform their religious rituals on board. Byzantine documentary evidence shows that ship own-

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[172] Articles II:14, II:12, and II:13.

[173] Muḥammad Ibn ʿAlī Ibn Yūsuf Ibn Muyassar, *Akhbār Miṣr*. ed. Henri Massé (Le Caire: Institut Français d'Archéologie Orientale, 1919), 77, 91; Ibn ʿAbdūn, *Seville musulmane*, 64; Wansharīsī, *Al-Miʿyār*, 8:304–305; Khalilieh, *Islamic Maritime Law*, 157–159.

[174] Scott, *op. cit.*, 3:134–139, Digest IV, 9, 1; Digest IV, 9, 1, 2; Digest IV, 9, 1, 3; Digest IV, 9, 1, 4; Digest IV, 9, 1, 6; Digest IV, 9, 1, 7; Digest IV, 9, 1, 8; Digest IV, 9, 3; Digest IV, 9, 3, 3; Digest IV, 9, 4; Digest IV, 9, 4, 1; Digest IV, 9, 5; Digest IV, 9, 5, 1; Digest IV, 9, 6; Digest IV, 9, 6, 1; Digest IV, 9, 6, 2; Digest IV, 9, 6, 4; Digest IV, 9, 7; Digest IV, 9, 7, 3; Digest IV, 9, 7, 4.

[175] Article III:3; Ashburner, *op. cit.*, 83, Justice, *General Treatise*, 88; Freshfield, *Manual of Later Roman Law*, 196; Dareste, "*Lex Rhodia*," 7; Letsios, *Das Seegesetz der Rhodier*, 258.

ers allocated spaces in supercargoes and cruisers for liturgical services.[176] Similarly, Islamic law dictated that Muslim ship owners set aside enough space for conducting prayers. The *fuqahā'* emphasize that Muslim worshippers must perform their religious duties properly, if they can. Women must stand behind the men, or be segregated from them if space permits.[177] Based on the foregoing, voyagers aboard Christian and Islamic vessels enjoyed similar rights to perform religious rituals at sea.

7. *Funeral Practices at Sea*

The procedure for dealing with a deceased passenger or seaman aboard Roman and Byzantine merchant ships is unclear. All we know is that, if anyone died during a voyage the corpse was jettisoned at once.[178] Although this issue is not addressed in the A. S., founders of the early Islamic law schools set out three methods for disposing of the corpse. In the case of disposal in the sea, it had to be weighted with a heavy object of metal or stone to ensure that it would sink and not float. This applied to ships sailing across the sea and some days' journey from the closest Muslim country. The second was to place the corpse in a coffin in the hope that the waves could carry it to the shores of a Muslim country where the inhabitants could bury it after the appropriate rituals. Islamic law prohibited this practice, if only non-Islamic territories were nearby. The third method was to keep the corpse in a tightly closed compartment until the ship reached her destination. Preserving a body on board depended on its condition "as long as there is no fear of decomposition".[179] With reference to the property of the deceased, the captain became its depositary until the ship moored at her destination, where he delivered it to the judicial authorities who were to transfer it to the estate. The depositary was held responsible for loss or damage to the deposited cargo, if there has been fault or negligence on his part.[180] The same applied to the ship's crewmen. Funeral rites were the same for deceased seamen and deceased passengers.

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[176] McCormick, *Origins of the European Economy*, 404, 410.
[177] The subject is extensively covered by Shamrānī, *Iṣ'āf Ahl al-'Aṣr*, 139–249.
[178] Casson, *Travel in the Ancient World*, 156.
[179] Khalilieh, *Islamic Maritime Law*, 168–171.
[180] *Ibid.*, 175; Noble, "Principles of Islamic Maritime Law," 60–65; Bodl. MS Heb. a3, f. 9, ll. 14–16.

8. *Contribution to Salvage*

Although the passenger had no contractual duty to assist when the ship and cargo were in danger, he could claim compensation if he did so. Any passenger traveling on the ill-fated vessel or another vessel rendering assistance was treated like any other salvager. The passenger had to prove that the salvage commenced when real danger existed and was carried out with the approval of the parties concerned. Remuneration was regulated by law and local custom and occasionally fixed by the shippers and salvagers.[181]

Summary

Mediterranean polities recognized three methods to acquire ownership of a vessel: building her, transferring her from an owner, or usurpation and confiscation. Shipping business was costly and therefore it was the arena of a small social sector—governors, courtiers, wealthy merchants, religious institutions and the like. In general, a ship had a single proprietor. When, however, more than one person owned a ship, their partnership had to be based on trusteeship and reciprocity among them. Expenses for repairs or profits from commercial transactions had to be distributed in accordance with each partner's shares. If a co-owner intended to sell his share, the other partners would have the first right to purchase her.

Byzantine and Islamic admiralty laws differ significantly in respect to the form of employment of and wage payments to seamen. Two methods of payment prevailed at the same time in the Mediterranean: profit sailing and wage sailing. Crewmen in the Byzantine Empire were employed on the former basis, where wages were commonly paid at the voyage's end. Such hire was somewhat risky, entailed both advantages and disadvantages to the crewmen. The benefits made the seamen, to some extent, fellow venturers with the owner of the vessel. Since their right to wages depended on the earnings from freight, seamen usually did their utmost to make the venture successful. They were not entitled to wages for periods when they failed to work or if natural or manmade mishaps made the venture

[181] See below, chapter six, 211–212.

unsuccessful. Where a vessel was wrecked or cargo jettisoned, seamen could lose part or all of their wages, proportionate to their income and shares.

Save for emergency circumstances, Islamic tradition adopted the Roman *locatio conductio operarum* and required the payment of wages before work started, even if local custom permitted withholding it to the venture's end.[182] However, even if advance payment was agreed upon, there were cases where seamen had to refund their entire pay or part of it to the ship owners. The reimbursement rules were applied in cases when the voyage was never undertaken due to bad weather conditions or enemy and pirate attacks.[183] Moreover, seamen were not necessarily entitled to their entire fee if their ship suffered unexpected attacks. Entitlement depended on the time of the attack, whether at the port of embarkation, *en route*, at the port of disembarkation, or during the return voyage to the homeport. In the first case, the ship owner was freed of liability to pay, and had the seamen already been paid, they had to refund their entire wages to him.[184] Otherwise, the hiring contract terms were considered. If the voyage was interrupted, the seamen were remunerated according to the distance covered, and if the contract was for seasonal hire, the seamen were compensated in proportion to the work time elapsed. These rules also applied in cases of shipwreck as well as in weather conditions that could prevent the completion of the voyage.[185]

In contrast to seamen's employment and wages, the legal status of passengers was similar in both bodies of law. Passengers were required to obey the captain's instructions, and their places on board were fixed by the contract of hire. They had to bring their supplies prior to departure and were not allowed to annoy fellow passengers or interfere with the seamen. However, they could perform their religious rituals and receive immediate assistance in dangerous situations. Despite these similarities, a major difference between Byzantine and Islamic maritime custom relates to including passengers' personal effects in calculating general average contributions. Islamic law,

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[182] Ṭāher (ed.), *op. cit.*, 18.
[183] Sughdī, *Al-Nutaf*, 2:558–559; Wansharīsī, *Al-Miʿyār*, 8:300–301.
[184] Wansharīsī, *Al-Miʿyār*, 8:298.
[185] Sughdī, *Al-Nutaf*, 2:558–559; Ibn Ḥazm, *Al-Muḥallā*, 7:26.

unlike its Byzantine counterpart,[186] generally excludes from averaging clothing, gold, silver, and private belongings not intended for commercial purposes, and food for private consumption. Only an insignificant number of jurists favored the Byzantine custom and included private belongings in the calculation of the general average.

[186] Letsios, *Das Seegesetz der Rhodier*, 141.

CHAPTER THREE

CARRIAGE OF GOODS

General

By definition, a shipping contract is an agreement between a shipper and a carrier, in which the latter offers a specific vessel or his own services to transport a quantity of cargo from one point to another, in the state it was received and recorded in the bill of lading at the embarkation point. Some fundamental questions come to mind. Were contracts necessarily in writing, or were oral contracts corroborated by witnesses sufficient? How many types of contracts for sea carriage were known to Byzantine and Muslim carriers and shippers and what were their fundamental legal differences? Where did the liability of the carriers and shippers begin and end? Did they ship under bills of lading? How were freight charges paid and what factors affected them? And under what circumstances could the affreightment contract be breached?

The Contract: Written or Oral?

The importance of a written contract emerged during the reign of Justinian I whose Institutes nonetheless validated oral agreements attested to by witnesses in the transactions of daily life.[1] Article III:20 of the N. N. provides that a ship leasing contract is void if its parties do not draw up a written contract.[2] The inclusion of such an

[1] Robin Evans-Jones and Geoffrey MacCormack, "Obligations," in *A Companion to Justinian's Institutes*, ed. by Ernest Metzger (Ithaca: Cornell University Press, 1998), 134–136, 148–150. It has been argued that witnesses must corroborate a binding written contract and thus this document is merely evidence of an agreement, but it does not create an obligation if it is not witnessed.

[2] Justice, *General Treatise*, 99; Letsios, *Das Seegesetz der Rhodier*, 158–160, 261–262; Ashburner, *op. cit.*, 98: "Where a man hires a ship, the contract to be binding must be in writing and subscribed by the parties, otherwise it is void." Oikonomides, "Level of Literacy," 169, assuming that if either party or the witnesses are illiterate these persons either draw a *signon* (*i.e.*, a cross) in the quarters of which the

Article in the treatise may be attributed to risks involved in carriage by sea and a maritime practice dating back to the second half of the third century B.C.[3] Nonetheless, the oral contract had an important legal position in Byzantine law, apparently due to the low level of literacy in that society; hence, written documents could be challenged on the grounds that the requirements for valid oral agreements observed.[4]

Even though the *Qur'ān* strongly supports oral contracts testified to by witnesses, at the same time it enjoins written evidence. Written documents had to be formulated by a notary[5] (or a scribe who could also be a witness) and attested to by two Muslim male witnesses, or one male and two females.[6] A document signed by the shipper and ship owner/carrier had no legal value without the attestation of two

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notary or scribe writes their names. Obviously, the lawyers' preference for composing written contracts aimed at avoiding legal disputes between the shipper and the carrier.

[3] Charles M. Reed, *Maritime Traders in the Ancient Greek World* (Cambridge: Cambridge University Press, 2003), 89–90; J. Walter Jones, *The Law and Legal Theory of the Greeks: An Introduction* (Oxford: Clarendon Press, 1956), 219. He argues that owing to Athens's growing importance as a port and the need to provide its citizens with a reliable grain supply, judicial authorities dealt speedily with disputes based on a written agreement.

[4] Letsios, *Das Seegesetz der Rhodier*, 159–160; Freshfield, *Manual of Later Roman Law*, 19–20, 90; Evans-Jones and MacCormack, *op. cit.*, 135–136; Robert Browning, "Literacy in the Byzantine World," *Byzantine and Modern Greek Studies* 4 (1978), 40–41, 46, 49; Nicolas Oikonomides, "Mount Athos: Level of Literacy," *Dumbarton Oaks Papers* 42 (1988), 169, 175. Literacy was common among certain classes: clergy, teachers, military men, public servants, and the wealthy.

[5] On the characteristics of the Muslim notary, consult Wansharīsī, *Al-Manhaj al-Fā'iq*, 228–252.

[6] *Qur'ān* 2:282: "Ye who believe! when ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing, let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as God has taught him, so let him write, let him who incurs the liability dictate, but let him fear his Lord God, and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully. And get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose for witnesses, so that if one errs, the other can remind her. The witnesses should not refuse when they are called on [for evidence]. Disdain not to reduce to writing [your contract] for a future period, whether long or short: it is juster in the sight of God, more suitable as evidence, and more convenient to prevent doubts among yourselves. But if it be a transaction that ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But take witnesses whenever ye make a commercial contract; and let neither scribe nor witness suffer harm, it would be wickedness in you. So fear God; for it is God that teaches you, and God is well acquainted with all things."

or more witnesses, and was considered inadequate proof if either party went to court. Despite the Qur'ānic injunction, Islamic courts admitted oral testimony because judges believed that no Muslim would lie under oath. However, written evidence could be a useful support for oral testimony in order to remind the shipper and ship owner/carrier of the terms of their agreement.[7]

Byzantine and Muslim jurists alike legalized oral contracts in their digests if they were attested to by witnesses. However, unwitnessed written and oral contracts were void and inadmissible in both systems, even if signed and endorsed by both parties. The level of literacy probably played a key role in the ratification of verbal contracts in courts. Since illiterates made up the great majority of the population, they created difficulties for the legal and administrative systems. As a matter of fact, the overwhelming majority of shipping contracts in the Mediterranean during this period were probably oral and dependent upon the consent of the parties. This would explain why very little written evidence has survived. Written contracts were of course drawn up and used as forms of proof in case of legal altercations among the contracting parties. In short, whether the contract was to be oral or in writing was decided by the parties themselves.

Types and Formation of Contracts of Affreightment

1. *Contract of Carriage in a Particular Ship*

Although the Digest, the N. N., and A. S. fix no precise formula for composing contracts of affreightment, they clearly spell out the rules of shipping, liabilities of the shippers and carriers, payment arrangements, and the circumstances in which the contract may be annulled. An actual Greek contract signed on a papyrus in Egypt in 236 C.E. for the water carriage of goods, states:

> Aurelios Herakles, son of Dioscoros from Antaeopolis, captain of his own ship of a capacity of 250 *artabas*, let it for hire to Aurelios Areios Herakleides, senator of Arsinoe, to transport 250 *artabas* of vegetable

[7] Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 67; Wakin, *Function of Documents*, 1–10; Rayner, *Theory of Contracts*, 86–91, 115–117, 162–163; Abdur Raḥmān I. Doi, *Sharīʿah: The Islamic Law* (London: Ta Ha Publishers, 1984), 355–357; Rahim, *Principles of Muhammadan Jurisprudence*, 282–289; Heffening, "Shāhid," *Encyclopaedia of Islam*, 1:261–262.

seed upon shipment from the roadstead of the grove of the metropolis (Arsinoe) to the roadstead of Oxyrhynchos for an agreed upon freightage sum of one hundred silver drachmas, of which he received henceforth forty drachmas, while he will receive the remaining sixty drachmas upon delivery. He will deliver this cargo safe and sound from sea peril. He will have two days to load the cargo from the 25th of the month, and likewise he shall wait in Oxyrhynchus four days. And, if the captain is detained longer [than four days], he will collect sixteen drachmas per day,[8] while he will have to provide sufficient sailors and the complete equipment of the ship. Also, he will receive a jar of wine for libation on his arrival at Oxyrhynchus.[9]

The chartering authority: (SECOND HAND) I, Aurelios Herakles have chartered (the ship) and received upon the oral agreement the forty drachmas, as mentioned above.

(FIRST HAND): in the year 3 of the Emperor Caesar Gaius Julius Verus Maximinus Pius Fortunus Augustus and Gaius Julius Verus Maximus the most holy Caesar Augustus son of Augustus 22nd of Phaophi.[10,11]

The procession from Romano-Byzantine legal texts to the Islamic ones of eighth and ninth century demonstrates that the principles of formulating a contract to lease [*kirā'* or *ijāra*][12] a particular ship had not changed. However, when the parties entered into an agreement

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[8] Gil, *In the Kingdom of Ishmael*, 4:149 [647], Gottheil and Worrell, 36, l. 17, a merchant account dated to 1080 enumerates, *inter alia*, how the hirer paid the ship owner, watchmen, gatekeeper, inspectors etc. 3.75 *dīnār*s for berthing the ship for two nights.

[9] Goitein, *Mediterranean Society*, 1:488, note. 11, ULC Or 1080 J 35, l. 35. Comparing the third century papyrus with an eleventh century Geniza letter proves that some maritime customs and seamen's mentalities barely changed over 800 years. In an eleventh century Geniza letter, the shipper offered the ship's captain two baskets of sweetmeats as a gratuity on safe arrival at their destination.

[10] Phaophi or Paope is the second month of the Coptic calendar, from October 11th until November 9th.

[11] Kenyon and Bell, *Greek Papyri in the British Museum*, 3:219–220, Pap. 948; Letsios, *Das Seegesetz der Rhodier*, 160–162; Casson, *Ships and Seamanship*, 257–258, he draws our attention to a third century C.E. leasing contract, where the lessor was required to fully outfit the chartered vessel with tackle and instruments.

[12] Where these terms are synonymous and have a similar meaning in English, Islamic law differentiates between them. The word *kirā'* means leasing or hiring out. It aims at the beneficial use or enjoyment of a thing for a fixed period to time in return for a hiring fee; corresponding to *locatio rei* in Roman law. The *ijāra* (corresponding to *locatio operarum*), however, is a contract by which one person makes over to someone else the enjoyment, by personal right, of a thing or of an activity, in return for payment. The period of the *ijāra* must be stated, but no limit is necessarily fixed. A.M. Delcambre, "Kirā'," *The Encyclopaedia of Islam* (1986), 5:126; E. Tyan, "Īdjār," *The Encyclopaedia of Islam* (Leiden: E.J. Brill, 1971), 3:1017; Schacht, *Introduction*, 21; Noble, "Principles of Islamic Maritime Law," 98–102.

to transport goods by water, they had to define the type of contract of affreightment, spelling out whether their agreement was to lease a specific ship or the services of a common carrier, who might be an owner of more than a vessel or a non-vessel-operating common carrier. This was imperative, for shipping laws differed significantly from one type to the other. When the contract of carriage was signed on chartering a specific ship, it had to be constructed as follows:

> So-and-so has chartered from so-and-so his entire ship—so-called the Cutter (*Kharrāq*), or the Kingfisher (*Qirillā*), the Galley (*Shānī*), including her rigging, sails, masts, external parts, grapnels, ropes, oars, and other equipment, in addition to her full complement of officers and crew named [all names listed], after the lessee has become acquainted with the specified ship, examined her as well as her equipment—for such-and-such amount of *dīnār*s paid fully in advance to so-and-so, or received from him such and such amount providing for the remained such-and-such amount be paid on such appointed time. He is required to transport so-and-so, his commodities—which are such and such, describing their weight and measure (in accordance with the normative standard at the market place of the port of embarkation)—aboard the specified ship and will have to carry for him his provisions, water, apparel for clothing and bedding, utensils, and other food additional to bread needed for his voyage. After loading the specified ship described above, he will have to depart from such and such town on such and such date, provided that he sails the known trunk routes until he brings him, God willing, to such and such destination. This is a lawful leasing contract. You, then, formulate it in accordance with the above-mentioned guidelines.[13]

A more detailed formulation, probably aimed to avert disputes and resorts to the legal process, was offered by al-Minhājī (d. 880/1475). He instructed the parties to incorporate additional technical and physical descriptions of the chartered ship prior to the departure date:

> The ship-leasing contract has to be formulated as follows: 'So and-so has chartered from so-and-so the entire vessel of either type of cargo vessel' [*Muwarraqī*, or *Bāṭṭūsī*], or other types of sea-craft, mentioned

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[13] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225. An identical *formula* is drawn by the Egyptian Ḥanafite scholar al-Ṭaḥāwī (239–321/852–933), *Al-Shurūṭ al-Ṣaghīr*, 1:447 and Mālikī jurist Ibn Salmūn, *Al-ʿIqd al-Munzzam*, 2:4–5; Burzulī, *Ǧāmiʿ Masā'il al-Aḥkām*, 3:659; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 432; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 66. On the composition of Islamic contracts, refer to Wansharīsī, *Al-Manhaj al-Fā'iq*, 295–459.

earlier in the Chapter on the Sales Contracts.[14] The contract should contain articles concerning the vessel's length, freight, and other integral equipment on board which are utilized to convey crops, passengers, and whatever is carried aboard such as wood, sheep, cows,[15] etc. that are transported upstream or downstream on the blessed Nile. In addition, [the contractants] should fix the period of leasing and the sum, which has either to be paid immediately before departure, after reaching the destination, or in installments.[16] Subsequently, the lessee is entitled to get what he chartered, make use of it, and load the cargo safely on board after scrutinizing, learning, and approving the contract which consists of offer [*ījāb*][17] and acceptance [*qabūl*],[18] and is concluded with a mutual consent. And if the ship-leasing contract stipulated the dispatch of a specific consignment to a definite destination and the freight be paid all at once, the contractants commence the agreement stating: So-and-so has concluded a contract with so-and-so to transport such-and-such crops aboard so-and-so's vessel,[19] from such-and-such port for such-and-such an amount of money. This is a legal contract.[20] Then the contractants add: The aforementioned lessor personally and his crew members should operate the vessel to transport the crops on board from the port of origin to the port of discharge.

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[14] Minhājī, *Jawāhir al-ʿUqūd*, 1:94–96.

[15] Contrary to the carriage in a general ship, some papyri from Roman-Byzantine Egypt associate Nile vessels with the type of cargo they transported. We often encounter vessels designated for a specific kind of shipment, so we read of "wood carrier," "stone carrier," "grain carrier," "wine carrier," *etc*., see Casson, *Ships and Seamanship*, 340. For the transport of domestic animals between Islamic Mediterranean port-cities see al-Wansharīsī, *Al-Miʿyār*, 8:64.

[16] Wansharīsī, *Al-Miʿyār*, 8:306, where the shipper and ship owner/carrier concluded a leasing contract without mentioning the financial arrangements, it is regarded invalid: "*wa-in sakatā fal-kirā' fāsid*"; 9:117, he points out that the transportation costs must be settled and affirmed in the contract before departure.

[17] The offer, as defined by Muslim jurists, is the statement made in the first place by one of the two contracting parties raising the subject between them. Susan E. Rayner, *The Theory of Contracts in Islamic Law* (London: Graham and Trotman, 1991), 103–109.

[18] *Qabūl* (acceptance) is defined as the statement made in the second place by the other party, which completes the contract, and must be in accordance with the offer. Like the offer, it can be offered orally, in writing, through appropriate acts, or through symbols; in certain cases, acceptance may also be implied from the party's silence. See Rayner, *Theory of Contracts*, 106.

[19] Ṭāher (ed.), *Akriyat al-Sufun*, 17; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 8:81–82. Even if the lessor brings his vessel for chartering, but the lessee does not assert verbally, in writing, or both that he is hiring that particular vessel, the lease would be considered guaranteed.

[20] The Arabic term as it appears in the text is "*muʿāqada sharʿiyya*" that can be translated as a legal or valid contract. The actual significance of this phrase is that both parties to the contract must conform to the legal nature of the contract by accepting the religious rules and the customary practice.

> May God protect them. Customarily, the gratuity is to be paid to the shipmaster and sailors. And God knows best.[21]

The two formulations of contracts of affreightment establish two cardinal principles governing the reciprocal responsibilities of the carrier and shipper. The first consists of the obligations undertaken by the ship owners. Carrier and shipper had to describe in detail the vessel's type, name, rigging, and equipment; the manpower on board, especially the identity of senior officers like the ship manager, captain, pilot, and scribe; the voyage course, with ports of origin and destination; the freight charges payable by the shippers; and, precautionary measures and inspections of the vessel carried out by the parties before loading. Second, the shipper assumed certain responsibilities. Shippers had to provide their names, the weight, quantity, quality, and disposition of their cargoes in the ship, transportation fees, departure schedule and the approximate arrival time, and provisions, including water, clothing and bedding to be carried aboard with them. Since the shipping and maritime trade depended upon the seaworthiness of the ship and the professional skills of the seamen,[22] ship owners had certain duties to fulfill before a ship's departure. Specifically, their duty was to inspect the whole ship thoroughly, including her rigging and navigation equipment while she was still in the yard. In addition, technicians had to complete repairs and caulking to meet safety standards, ensuring that the ship was completely watertight before she sailed.[23] In short, the parties to the contract had to take care to lease a fully equipped and seaworthy vessel.[24]

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[21] Minhājī, *Jawāhir al-ʿUqūd*, 1:293–294. Muslim notaries were required by law to write out two copies or more of each contract of lease or employment. See Wansharīsī, *Al-Manhaj al-Fā'iq*, 434–435.

[22] The principles established by Romano-Byzantine and Islamic lawyers remained effective in the Mediterranean for centuries. Outlining the freight contracts of medieval Italian city-states, Dotson states that a typical leasing contract for a particular ship consisted of: the ship owner's statement, which included type and identification of the chartered vessel; ports of departure and arrival; affirmation that the vessel was fully rigged and operated by a full, competent crew; the place and time the vessel would be available for loading, including the length of time that the vessel will wait to load; amount of shipment; a statement of freight rate and payment procedures; a joint statement where both the owner and shipper, agreed to respect the contract terms or be subject to a penalty; finally, place, date and time where the where the contract was made, specifying witnesses. See Dotson, "Freight Rate and Shipping Practice," 68–70.

[23] Ibn Mājid, *Al-Fawā'id*, 239; Gil, *op. cit.*, 2:549–550 [187], Mosseri V 369 (= L 52), ll. 9–11.

[24] Kenyon and Bell, *Greek Papyri in the British Museum*, 3:220, Pap. 948; Hunt,

For safety reasons Byzantine lawyers advised shippers and travelers to sail in new ships, especially if they carried heavy loads and precious cargoes.[25] Experienced Geniza traders and travelers also followed this recommendation and warned their proxies and acquaintances not to sail in previously damaged craft, but to embark in new vessels.[26] Furthermore, shippers and passengers who intended to sail

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Oxyrhynchus Papayri, 18:253, Oxy. 2136; Scott, *Civil Law*, 4:211, Digest XIV, 2, 6; 4:212, 5:195, Digest XXI, 2, 2, 44; Ashburner, *Rhodian Sea Law*, 92, Article III:11; Letsios, *Das Seegesetz der Rhodier*, 156, 158–159, 260; Ṭāher (ed.), *op. cit.*, 52; Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:447; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Minhājī, *Jawāhir al-ʿUqūd*, 1:94–96; Gil, *op. cit.*, 4:196 [662], TS 8 J 24, f. 21*v*., (right margin) ll. 1–2, (upper margin), l. 1. The key elements upon which ship seaworthiness depended were the masts, sails, skins, anchors, ropes, tillers, boat, and oars. Article III:11 of the N. N. advises shippers to undertake a thorough investigation of the ship's tackle and equipment, but does not dictate an inclusion of the mechanical details in the leasing contract. By contrast, Muslim lawyers tell the contracting parties to state in minute detail the ship's rigging and navigational instruments, apparently to avoid legal complications in the course of transport. However, is every merchant aware of the technicalities of sailing ships? Certainly, except for frequent travelers, most merchants were not. Thus, it is plausible that contracts of affreightment were either formulated by lawyers and notaries acquainted with the shipping business residing in Muslim ports around the Mediterranean, or were concluded among persons who knew the maritime industry. Regarding a thirteenth century Italian leasing contract, see Robert Lopez and Irving Raymond, *Medieval Trade in the Mediterranean World* (New York: Columbia University Press, 1955), 239–245; Frederic C. Lane, *Venice and History*: *The Collected Papers of Frederic C. Lane*, ed. by a Committee of colleagues and former students (Baltimore: J. Hopkins Press, 1966), 244–245.

[25] Scott, *op. cit.*, 4:212, Digest XIV, 2, 10, 1; Letsios, *Das Seegesetz der Rhodier*, 156, 260; Ashburner, *op. cit.*, 91–92, Article III:11: "The merchants and the passengers are not to load heavy and valuable cargoes on an old ship. If they do so and while the ship is on voyage it is damaged or destroyed, he who loaded an old ship has himself to thank for what has happened." The Arabic version of this charter was promulgated by Pope Gabriel II, the Seventieth Pope of Alexandria, known as Ibn Turaik, in his canon collection entitled *Qawānīn al-Mulūk*. See Leder, *Die arabische Ecloga*, 116–117, Article 28:9.

[26] Goitein, *Letters*, 105–106 [18]; TS 12.250, l. 19: "load the cargo in the newest vessel [*wassiqhā fī arwaj markab*]"; TS 10 J 19, f. 19: "ten out of your thirty bales were shipped to al-Mahdiyya aboard the new ship of Ḥussein al-Lakkī"; TS 16.179, l. 41, warning of bad ship: ". . . and I told him not to travel aboard this vessel [. . . *anī qultu lahu lā tarkab fī hādhā al-markab*]"; *idem*, "The Last Phase of Rabbi Yehudah Hallevi's Life in the Light of the Geniza Papers," *Tarbiz* 24 (1955) (Hebrew), 43, TS 13, J 15, f. 20, ll. 30–31: "When a group of our friends arrived on board the vessel of the army commander at Alexandria, they informed us that our Rabbi Judah ha-Levi is arriving aboard the new vessel of the Sulṭān [*fī markab al-jadīd al-ladhī lil-Sulṭān*]"; *idem*, "Jewish Trade," 183, TS 12.391, l. 5; Gil, *op. cit.*, 2:396 [139], TS Misc 25.133, l. 8; 2:550 [187], Mosseri V 369 (= L 52), l. 10; 2:802 [270], TS Arabic 30.123, l. 2; 2:886 [294], ENA 1822 A, f. 9, a, l. 13, b, refers to the old ship [*al-markab al-qadīm*] of Ibn al-Baʿbāʿ, on 3:409 [418], TS 12.229, l. 10 refers to the "new ship of Ibn al-Baʿbāʿ"; 3:517 [453], TS 12.380 (1: right margin), l. 4; 3:534 [460], Mosseri II 128, ll. 11, 13; Ben-Sasson, *Jews of Sicily*, 623 [125], ENA

were advised to gather information about the ship and her crew from previous passengers.[27] Such an inquiry was recommended to ensure that the ship would sail with sufficiently skillful and reliable seamen.[28]

The charter of a ship in the Mediterranean could take one of three forms: (a) voyage charter, where a ship was hired for a specific voyage or consecutive voyages; (b) time charter, where the shipper hired a vessel manned by her owner and crew for a specific period; and (c) demise charter, where the charterer operated a ship as though she were his own, in which case, the actual owner bears no responsibility for the shipped goods and crew's professional performance.[29] A shipper could then charter the whole vessel, reserve space for himself and someone else's shipments aboard a specific vessel, or rent her to a third party if the contract terms so permitted.[30]

2. *Contract of Carriage with a Common Carrier*

Known in Islamic law as a guaranteed personal service (*maḍmūn fī dhimmatihi*),[31] the second type of agreement revolved around the

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1822 A, f. 9*v*., l. 4, refers to the old ship [*al-markab al-qadīm*] of Jabbāra, the governor of Barqa.

[27] Article III:11; Ashburner, *op. cit*., 91–92; Justice, *General Treatise*, 94; Freshfield, *Manual of Later Roman Law*, 197–198; Dareste, "*Lex Rhodia*," 11; Letsios, *Das Seegesetz der Rhodier*, 260; Scott, *op. cit*., 4:200, Digest XIV, 1, 1; Kindī, *Al-Muṣannaf*, 18:53; 21:153–154.

[28] Scott, *op. cit*., 4:200, Digest XIV, 1, 1, 1; 4:207–208, Digest XIV, 2, 2; 5:81, Digest XIX, 2, 13, 2; 9:21, Digest XXXIX, 4, 11, 2, refers to disloyal officers, who smuggle merchandise on board. Regarding the Islamic world, see Ibn Mājid, *Al-Fawā'id*, 241; Ṭāher (ed.), *op. cit*., 14: "The validity of the contract for leasing ships and hiring seamen, and so forth, is posited on the safe delivery [of cargo], on the professional behavior [of the crew], and on the unambiguous designation of the destination."

[29] Hunt, *Oxyrhynchus Papyri*, 17:250–253, Oxy. 2136; Ashburner, *op. cit*., 103, Article III:25; Letsios, *Das Seegesetz der Rhodier*, 262; Khalilieh, *Islamic Maritime Law*, 62–64; Noble, "Principles of Islamic Maritime Law," 102–103; Dotson "Freight Rate and Shipping Practices," 63–64. For an explicit reference to demise charter in early Islamic maritime law, consult Ṭāher (ed.), *op. cit*., 42; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:108.

[30] Scott, *op. cit*., 4:202, Digest XIV, 1, 1, 12; 4:208, Digest XIV, 2, 2; 4:212, Digest XIV, 2, 10, 1; Justice, *General Treatise*, 100; Freshfield, *Manual of Later Roman Law*, 200; Dareste, "*Lex Rhodia*," 17; Letsios, *Das Seegesetz der Rhodier*, 158; Ashburner, *op. cit*., 102, Article III:22: ". . . where the merchant loads the whole ship according to their contract"; Ṭāher (ed.), *op. cit*., 17, 18; Saḥnūn, *Al-Mudawwana*, 4:442; Goitein, "Portrait of a Medieval India Trader," 461–462, TS AS 156.238*v*., ll. 1–9: "Having sought God's guidance, I decided to travel to Fāknūr in the same boat in which we had arrived, for it had been blessed for me. I rented from them storage space from 150 *bahārs* (spice), 100 for pepper and 50 for various other goods."

[31] Ṭāher (ed.), *op. cit*., 16; Ibn Fāyi', *Aḥkām al-Baḥr*, 431–433.

transportation and safe delivery of passengers and commodities on board a ship that probably plied a regular route at scheduled times.[32] Specified payment arrangements, type and volume of cargo, ports of loading and the ports of discharge, routes and stopovers, and the exact sailing date were the basic components of a valid contract. While shippers either transferred their goods to the carriers or accompanied them, the carriers were bound to provide a seaworthy craft and safely transport the cargoes in the state they were received at the port of origin. Ibn al-Mughīth (d. 459/1067) instructed the parties to a leasing contract to formulate it as follows:

> So-and-so, the son of so-and-so has acknowledged before the witnesses of this sound and legal contract that he collected such-and-such amount on the condition of transporting him as well as his such-and-such *rubāʿī*,[33] or so many *mudd*[34] of grain, or so many *kayl*,[35] as established in this or that place,[36] aboard one of the reliable but non-designated ships known as so-and-so,[37] from such-and-such place to such-and-such destination, provided that he sails the known trunk routes and departs at the beginning of such-and-such month of the such-and-such year.[38] Conclude the contract by the testimony of witnesses and await the execution of the transaction on the agreed date.[39]

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[32] Digest XIX, 5, 1, 1, expressly refers to hiring the services of persons involved in the shipping business: "Labeo states that a civil action *in factum* should be granted to the owner of merchandise against the master of a ship, where it is uncertain whether he leased the ship, or hired the services of the master for the transportation of his goods." See Scott, *op. cit.*, 5:107.

[33] One quarter of a *dīnār*.

[34] *Mudd* derives from the Greek *modius*. It is a half bushel, or a dry measure of corn or other grain; equal to a *raṭl* and one third. The *mudd* capacity in ʿIrāq is about 1.05 liters, in Syria 3.673 liters, and in Egypt 2.5 liters.

[35] A grain measure.

[36] Muslim caliphs and provincial governors did not impose a uniform system of weights in their empire. Instead, they maintained local systems, which created different metrological systems even within the same district. Hence a unit of measure in Egypt differs from the same unit in ʿIrāq or Palestine; and a unit in urban centers differs from the same unit in the countryside of the same province. Establishing weights and measures in the contract was therefore important in order to prevent arguments from either party. For further details, see Eliyahu Ashtor, "Levantine Weights and Standard Parcels: A Contribution to the Metrology of the Later Middle Ages," *Bulletin of the School of Oriental and African Studies* 45 (1982), 471–488.

[37] Ibn al-Mughīth is most likely referring to the type of the hired vessel rather than her designated name.

[38] Ṭāher (ed.), *op. cit.*, 21; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228; Qarāfī, *Al-Dhakhīra*, 5:485; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:499–501.

[39] Ibn Mughīth, *Al-Muqniʿ fī ʿIlm al-Shurūṭ*, 243–244. Jazīrī, *Al-Maqṣad al-Maḥmūd*, 225, suggests a slightly modified formula: "So-and-so binds himself to transport so-and-so—his commodities which are such and such, provisions, and apparel for cover

The carrier's liability began as soon as the shipper delivered the consignment on the quay[40] or aboard the ship. In exchange, the carrier gave a receipt of declaration to the shipper, which contains details of the bulk, weight, type, and condition of the goods, names of the carrier and shipper, ports of origin and destination, and the lading and departure schedule. In principle, the ship's operators could not be held liable for damage to the cargo, which was the responsibility of the party with whom the shipper signed the contract of lease. The carrier assumed for losses and contractual defaults caused by the unseaworthiness of the vessel, or negligent acts or defaults of his crew of himself. However, he is not held responsible for losses occasioned by unpredictable human hostilities and acts of God.

Bills of Lading

Given the tedium and risk of sea travel in ancient times, wealthy and middle class merchants tried to avoid it. They preferred to have their agents accompany the shipments, or entrust them to carriers or acquaintances or friends traveling aboard the same vessel or in the same convoy. Where the shipper relied on a carrier, the shipmaster acknowledged the delivery of cargo by giving it a bill of lading. By definition, a bill of lading was a receipt of declaration, certified

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and bedding needed for him—aboard unspecified ship operated by full complement of crew, from such and such place to such and such destination, provided that he sails in the known trunk routes. This is a lawful leasing contract. You, then, formulate it in accordance with the abovementioned guidelines."

[40] Historical and archeological evidence prove that all Islamic city-ports mentioned in A. S. had artificial quays such as Fusṭāṭ, Alexandria, Tripoli, Sirt, al-Mahdiyya, Sūsa, and Tūnis. However, I would assume that the majority of small ports and stopovers located between international maritime hubs had natural roadsteads and goods were carried from large vessels by small boats to the shore. On p. 28 the author of the treatise refers to the quayside (roadstead) or terminal as [*al-nuzūl*]. Letsios calls our attention to the legal differences between *portus* and *statio* in Medieval Christian Europe. The former was an installation financed, and closely supervised and controlled by the state officials where its development was dependent on the political conditions as well as the socio-ecnomic life of the city. Due to the political upheavals that prevailed in the Western Roman Empire in the late fourth century C.E. and the threats paused by the Goths and the Vandals, Roman legists tended to classify the ports around the Mediterranean into *portus liciti* and/or *portus illiciti*. The *statio*, however, served as stopover for the supply of goods, repair, and all kinds of emergency cases. In ceratin cases, this theoretical separation is hardly applicable. For further details on this topic see Letsios, *Das Seegesetz der Rhodier*, 104–109.

by the ship's scribe or cargo manager, affirming the quantity and quality of consignments taken on board. Besides the volume and description of cargo, it contained the ship owner/captain and shipper's names, ports of origin, ports of call, and the lading and departure schedule. It was one of the most important documents a plaintiff could present to the legal authorities to substantiate the affidavit supporting his claims and refute a defendant's contentions.

The origin and development of bills of lading are uncertain, but Bensa has concluded that it developed "when merchants ceased to go out with their goods, and business was conducted chiefly by correspondence with agents and friends in foreign places. . . ."[41] His hypothesis is that the evolution of the bill of lading is associated with the physical absence of shippers. As early as 251 B.C., written evidence from Hellenic Egypt proves that ship owners or captains issued triplicate statements acknowledging the receipt of goods. While two copies of the receipt were dispatched to the shipper, the third was retained by the carrier/ship owner.[42] The receipt consisted of the quantity and quality of the shipment, names of the dispatcher, the recipient, and the vessel's and her owner's/owners' name/s, and ports of origin and destination.[43]

Byzantine merchants not only continued this practice but embodied it in their legal codices. Article III:12 of the N. N. may refer indirectly to the existence of the bill of lading in Byzantine maritime practices. It decrees that if a shipper "makes a deposit in a ship, he must entrust it to a man known to him and worthy of confidence before three witnesses. If the amount is large, let him accompany

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[41] Enrico Bensa, *The Early History of Bills of Lading* (Genoa: Stabilimento d'Arti Grafiche Caimo, 1925), 6; William P. Bennett, *The History and Present Position of the Bill of Lading as a Document of Title to Goods* (Cambridge: Cambridge University Press, 1914), 1–8; Lopez and Raymond, *Medieval Trade*, 245–246. The latter substantiate the notion that the bill of lading came into existence in medieval Europe prior to the thirteenth century.

[42] Grenfell and Hunt, *Hibeh Papyri*, 1:270–271, Mummy 117.

[43] Arthur Hunt and Gilbart Smyly, *The Tebtunis Papyri* (London: Egypt Exploration Society, 1933), 3:330–333 [doc. 825]; Hunt and Edgar, *Select Papyri*, 2:459, P. Hib. 98; Hunt, *Oxyrhynchus Papyri*, 9:218–219, Oxy. 1197; Bernard Grenfell and Arthur Hunt, *The Oxyrhynchus Papyri* (London: Egypt Exploration Fund, 1914), 10:180–183, Oxy. 1259 and 1260; *idem, Hibeh Papyri*, 1:270–271, Mummy 117; Peter Parsons *et al.*, *The Oxyrhynchus Papyri* (London: Egypt Exploration Fund, 1968), 33:99–101, Oxy. 2670; Edmund Harris, *Papyri in the Princeton University Collection* (Princeton: Princeton University Press, 1936), 2:14–18, AM 8930; David S. Crawford, *Papyri Michaelidae* (Aberdeen: Aberdeen University Press, 1955), p. 145, doc. 127.

the deposit with a writing."[44] The cargo owner hands his possessions over to the ship owner for safekeeping provided that both parties record the deposit in writing before three witnesses. The major difference between a bill of lading and the deed of deposit cited in the N. N. is that the bill of lading is not a contract of carriage of goods but a receipt signed by the master or on his behalf indicating the apparent order and condition the goods have been received on board. Such a document is signed solely by the carrier, who gives a copy to the shipper before departure. The absence of an explicit reference to the bill of lading in the N. N. should not be interpreted to mean it did not exist in the Mediterranean shipping industry from the seventh century onwards. On the contrary, the practice of giving a bill of lading to a shipper when the cargo was loaded began several centuries before the Christian era.[45]

Historical accounts and Geniza letters establish that by the late ninth century, wealthy merchants no longer accompanied their cargoes overseas and instead entrusted them to their proxies or carriers, provided the ship's scribe registered all shipments taken aboard in the cargo book[46] and delivered a receipt to the actual shipper.[47]

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[44] Ashburner, *op. cit.*, 83–85.

[45] Sirks, *Food for Rome*, 123–124, 156, 205.

[46] Ṭāher (ed.), *op. cit.*, 37; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 229; Muqaddasī, *Aḥsan al-Taqāsīm*, 10 uses the term *dafātir* (log books); Jamāl al-Dīn Abū al-Fatḥ Yūsuf Ibn Yaʿqūb Ibn al-Mujāwir, *Ṣifat Bilād al-Yaman wa-Makkah wa-Baʿ(z.) al-Ḥijāz al-Musammā Tāʾrīkh al-Mustabṣir* (Leiden: E.J. Brill, 1951), 1:139; Assaf, *Texts and Studies*, 133, TS 16.54, l. 31; Gil, *op. cit.*, 2:634 [217], TS Arabic 18 (1).101, l. 12 (*al-sharanbal*); 4:21 [614], ENA NS 18, f. 35*v*., l. 22; p. 436 [745], INA D 55, f. 14*v*., l. 20. With reference to the ship's scribe, *ibid.*, 149 [647], Gottheil and Worrell, 36, l. 24 (*kātib mawrida*, literal translation is "registrar of cargo").

[47] Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:88 (*iqrār* or *taṣdīq*); Goitein, *Letters*, 274, 333–334 [77], TS NS J 300; Gil, *op. cit.*, 2:369 [132], TS 12.282, l. 11; 2:599 [204], TS 12.325, l. 14 (*ruqāʿ al-ḥaml*); 2:606 [207], TS 12.291, l. 16; 2:616 [211], TS 10 J 11, f. 17, ll. 8, 10; 2:763 [256], Mosseri II 188, l. 13; 2:911 [299], TS Arabic 51.87, c, l. 17; 3:27 [311], ENA 4100, f. 29, l. 19; 3:162 [353], TS K 25.250*v*., l. 5; 3:187 [360], TS AS 151.154*v*., l. 1; 3:200 [364], TS 16.263, l. 14; 3:233 [370], TS 8 J 16, f. 31, l. 13 (*risālat ḥaml*); 3:384 [409], TS 12.362, l. 10 (*taʿabiyat al-matāʿ*); 3:520 [454], ENA 1822A, f. 28, l. 15; 3:528 [458], Bodl. MS Heb. c 28, f. 34, l. 29; 3:850 [559], TS 10 J 31, f. 8, l. 10; 4:149 [647], Gottheil and Worrell, 36, l. 18; 4:618 [808], TS 13 J 17, f. 7, l. 24; 4:619 [809], John Rylands Library (unidentified), a bill of lading dated to 1050 deals with a delivery of 113 *dīnār*s to Nahray Ibn Nissīm and Jacob Ibn Ismāʿīl al-Andalusī. Mariners around the Indian Ocean and Arab Sea call the bill of lading as *satmī* or *shaṭmī* (an Indian word). See TS 18 J 2, f. 14, l. 18–20: "(18) I verified this from the *shatmī* (*satmī*) of the ship, which was kept by (19) Shaykh Makī Ibn Abū al-Hawl, for memos in the (20) ship"; TS NS J 5, l. 50; R.B. Serjeant, "Maritime Customary

Meanwhile, the shipper could send a receipt enclosed in a private message to the addressee (recipient of cargo) elaborating the shipment's contents and volume by means of express mail in order that it reach the destination before the vessel. This advanced technique of commerce and correspondence, documented by many Geniza merchants' letters, enabled merchants and their proxies to verify the volume and type of commercial items shipped by sea. It was an efficient practice used in Islamic territories in particular, and was subsequently adopted by Latin European polities during the thirteenth century.[48] By way of illustration, a 1020 Geniza letter addressed by Abraham Ibn Joseph al-Ṣabbāgh to Jacob Ibn ʿAwkal substantiates the legal evidence and reports how the sender "agreed with the ship owner to transport and release the cargo at the destination."[49] However, the shipment cauld not be unloaded and released unless the recipient presented a copy of a bill of lading to the ship's scribe and port authorities.[50] These bills of lading were used to (a) ensure that there was no discrepancy between the amount entered in the bill and the quantity measured on arrival; (b) identify the real recipient of cargo; and (c) pay the official tolls, taxes, and customs before releasing the shipments.[51] The bill of lading was viewed not as a contract of carriage, but evidence of the contract between a ship owner or his representative and shipper or his agent. However, in the absence of a

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Law off the Arabian Coasts," in *Sociétés et compagnies de commerce en orient et dans l'océan indien* (Paris, 1970), 204–205.

[48] Bensa, *Early History of Bills of Lading*, 7–10; Lopez and Raymond, *Medieval Trade*, 245–246; Dotson, "Freight Rate and Shipping Practices," 62–63.

[49] Goitein, *Letters*, 86 [14]; Gil, *op. cit.*, 2:606 [207], TS 12.291, l. 19. The Arabic text reads: "*ittafaqnā maʿ ṣāḥib al-markab an yukhalliṣahum.*" Goitein's translation is: "I agreed with the ship owner that he would transport the goods to their destination." The sender, according to the Arabic text, definitely refers to transport and release of cargo at the destination. Such an agreement signifies that the ship owner is liable for discharging the cargo, warehousing it, and releasing it from the customs, *ibid.*, 3:258 [374], TS 12.226*v.*, ll. 10–11, with reference to part of the consignment "lost on the gangplank while unloading the cargo," the shipper refrained from seeking refund from the ship owner.

[50] Gil, *op. cit.*, 3:27 [311], ENA 4100, f. 29, ll. 19–20: "I enclose the bills of lading with my letter and hope you may have already received them. Take out a bill [of lading] and release one load only"; 3:233–234 [370], TS 8 J 16, f. 31, ll. 12–17; 3:850 [559], TS 10 J 31, f. 8, ll. 9–10; 4:618 [808], TS 13 J 17, f. 7, ll. 24–25 warns against the seizing of cargo by the port authorities should the recipient not provide the bills of lading.

[51] Further legal information on the importance of the bill of lading in Islamic law is illustrated by Nobel, "Principles of Islamic Maritime Law," 131–139; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 435–436.

written contract, the bill of lading may have been treated as the contract.[52]

Carrier's Liability for Partial Damage and Total Loss

This subject poses some cardinal questions: Who among the following parties—the ship owner, captain, crew, shipper, or passenger—is responsible for loss or damage to cargo on board? In what situations is the liability of ship owners and crew excluded? Explicit answers to these and other issues are vaguely treated in the N. N. By contrast, the Digest and the A. S. deal at length with liability for loss or damage and draw a clear distinction as to when it is incurred by the shipmaster or his crew.

Let us begin with the Justinianic Digest. As a matter of principle, a ship owner takes full responsibility for the safekeeping and delivery of cargo in the state it was received at the port of origin up until it arrives at its destination.[53] The potential liability of the *exercitor navis*[54] for safekeeping of property begins when it is placed on board.[55] If the carrier fails to fulfill his duty and the entire ship was leased, the shipper will be able to bring action against him on the hire, even for goods that are missing. Furthermore, if the goods were accepted free of charge, an action on deposit can be brought.[56] In the first case, a hirer can sue the shipmaster on the grounds of *dolus*,[57] *culpa* (negligence), fraud or a deliberately performed unlawful act. In the second instance, a carrier is held liable only for *dolus*.[58] However, where the loss or damage occurs through unavoidable factors that

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[52] See further chapter four, footnote no. 158.

[53] Scott, *op. cit.*, 3:134, Digest IV, 9, 1.

[54] *Exercitor navis* is the person who profits from the use of a ship, whether the owner or charterer. Digest XIV, 1, 1, 15 defines the terms as follows: "When we use the word "*exercitor*," we understand by it the party into whose hands all receipts and payments come, whether he is the owner of the ship, or whether he has leased it from the owner for a fixed amount for a certain time, or permanently."

[55] Scott, *op. cit.*, 3:136, Digest IV, 9, 1, 8.

[56] *Ibid.*, 3:136, Digest IV, 9, 3, 1.

[57] *Dolus*: Guilty intention, or malice; or, behavior that relies on deception to achieve its purpose, trickery, treachery cunning. See Henry Liddell and Robert Scott, *A Greak-English Lexicon* (Oxford: Clarendon Press, 1968), 443; P.G.W. Glare, *Oxford Latin Dictionary* (Oxford: Clarendon Press, 1982), 570.

[58] Ashburner, *op. cit.*, clix; Letsios, *Das Seegesetz der Rhodier*, 200.

cannot be anticipated, like shipwreck or piracy, the ship owner is relieved of liability.[59]

Carriers are responsible for the safety of their craft and cargo, as well as for the behavior of the crew. An unprofessional performance, a wrongful or negligent act on the carrier's part, and/or those of his officers and crew, ashore or on board, make him accountable for any loss or damage resulting therefrom.[60] For instance, suits can be brought against the carrier on the grounds that he appoints *nauphylakes*[61] to look after the merchandise.[62] Therefore, misconduct or felonies on their part make the *exercitor navis* responsible for loss or damage to the cargo.[63] Therefore, the *exercitor navis*, who appoints the *magister navis*[64] is required to hire trustworthy seamen to operate and manage the ship.[65] The Digest further rules that the *exercitor navis* may be held liable not only for the acts of the crew, but also for the passengers.[66] This liability applies to merchandise, to the passengers' personal effects and provisions,[67] as well as to merchandise

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[59] Scott, *op. cit.*, 3:136, Digest IV, 9, 3, 1.

[60] Whether the *culpa* or *dolus* is confined to acts of seamen on board the ship or includes also misconduct on land is unresolved in the Digest. For instance, Digest IV, 9, 3 states: ". . . where the property has not yet been placed on board a ship, but has been lost on land, it is at the risk of the owner of the vessel who at first took charge of it." By contrast, Digest IV, 9, 7 rules: "The owner of a vessel shall be responsible for the acts of all of his sailors, whether they are freemen, or slaves, and not without reason, for he himself employed them at his own risk. But he is not responsible, except where the damage has been committed on board the vessel; for where it happens off the vessel, even though it was committed by the sailors, he will not be liable." Furthermore, where Digest XLVII, 5, 1, 6 relieves ship owners of liability for damages committed by travelers, Digest IV, 9, 7, 2 rules out any liability of a ship owner for acts done by one seaman against another: "Where any of the sailors cause damage to the property of one another, this does not affect the owner of the ship."

[61] Those who keep watch on board, *i.e.*, guards or stevedores.

[62] Scott, *op. cit.*, 3:135, Digest IV, 9, 1, 3; 3:138, Digest IV, 9, 7: "The owner of a vessel shall be responsible for the acts of all of his sailors, whether they are freemen, or slaves, and not without reason, for he himself employed them at his own risk."

[63] *Ibid.*, 3:134, Digest IV, 9, 1, 2.

[64] Master, captain or the person in charge of the care of the entire ship.

[65] Letsios, *Das Seegesetz der Rhodier*, 126.

[66] *Ibid.*, 3:136, Digest IV, 9, 1, 8. This principle applies to passengers, who serve as seamen: "But where anyone is both sailor and merchant, he will be responsible, and where the party injured is one of those commonly called *naulepibatai* that is to say one who works his passage, the owner will be liable to him also; and he will be responsible for the acts of a person of this kind since he also is a sailor." See Scott, *op. cit.*, 3:138, Digest IV, 9, 7, 2.

[67] *Ibid.*, 3:135, Digest IV, 9, 1, 6.

accepted as a pledge on account of money loaned for the voyage.[68]

The Digest seems to cover all aspects of felonious theft. It draws a clearcut distinction as to when the *exercitor navis*, rather than the wrongdoer, becomes liable, and vice versa. On principle, the *exercitor navis* has to cover the acts of the crew and of other persons on board.[69] Nevertheless, the Digest further states that if a crewmember commits theft or assault, the aggrieved person has two means of redress: he may either sue the *exercitor navis* or the wrongdoer; occasionally he has the legal right to sue both for the same felony or transgression.[70] He can opt to bring an action for damages against the *exercitor navis* only, in which case, if the person in charge of the vessel is acquitted, the injured party can then bring suit against the actual culprit. The Digest entitles the *exercitor* to crossclaim against a seaman who steals goods that the former has undertaken to transport,[71] or, if damages against him are recovered, he can bring an *ex conducto* suit against the seaman who committed the felony.[72] If, however, the culprit happens to be the *exercitor*'s slave-seaman, the *exercitor* can avoid liability by surrendering him to the claimant.[73] Whether a shipper is granted the right to sue the ship's master or not depends on the terms of the master's contract of employment as well as the authority granted him by the owner. Where a ship owner appoints a master but limits his authority, the latter must comply with the restrictions imposed by the former. For instance, if the owner appoints a master only for the purpose of collecting the freight, but not leasing the ship, the owner will not be liable for damage that occurs on a charter contracted by his shipmaster. Likewise, if the shipmaster was appointed to contract with passengers but not to offer the use of the ship for merchandise, or vice versa, and exceeds his instructions, he

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[68] *Ibid.*, 3:135–136, Digest IV, 9, 1, 7.

[69] *Ibid.*, 3:134, Digest IV, 9, 7; 10:79, Digest XLIV, 7, 5, 6: "The master of a ship . . . is held to be responsible for a quasi criminal offense for any damage or theft which may be committed on board the ship"; 10:286, Digest XLVII, 5, 1: "An action is granted against those who have control of ships . . . where anything is alleged to have been stolen by any one of them, or by persons in their employ; whether the theft was committed with the aid and advice of the proprietor himself, or the owner of the ship, or of those who were on board for the purpose of navigation."

[70] *Ibid.*, 3:137, Digest IV, 9, 4; 10:286, Digest XLVII, 5, 1, 4.

[71] Watson, *Digest of Justinian*, Digest IV, 9, 3, 5; Digest XLVII.

[72] Scott, *op. cit.*, 3:138, Digest IV, 9, 6, 4.

[73] *Ibid.*, 3:139, Digest IV, 9, 7, 4; 10:286, Digest XLVII, 5, 1, 5.

does not bind the owner.[74] Put another way, liability for loss and injury to cargo and humans is upon the owner rather than the master of the ship if the latter is proved to have followed the owner's instructions and fulfilled his duty professionally. Thus, he is not authorized to cancel the charter, to alter its terms or the vessel's course, or the freight charges without the consent of the vessel's owner(s). However, where a master enjoys all-inclusive authority, he can carry out transactions on behalf of the owner, including borrowing money for the repair of the ship.[75] Here too, shippers and passengers have the right to sue him or his employer in case of loss or damage to their goods and personal effects.[76] Furthermore, there is redress for harm to the belongings and cargo of passengers: "If something is thrown out from a ship an *actio utilis* will be granted against the person in charge of the ship."[77] This applies even if the claimant paid no fare.[78] Ultimately, the Digest absolves the *exercitor navis* or *magister navis* from liability if he warns a shipper or a passenger accompanying his shipment to look after his goods.[79]

The carriers' liability for loss or damage in Islamic law has been dealt with in the sixth chapter of the A. S. and meticulously summed up by Noble. She argues that Islamic jurisprudence distinguishes between three types of liability: absolute liability, vicarious liability, and liability based on fault. The *Sharīʿa* divides absolute liability into two categories: that of a common carrier (*ajīr mushtarak*) and that of a private carrier (*ajīr khāṣṣ*). *Ajīr mushtarak* is defined as "a person with whom a contract is made for a specific task such as tailoring a garment or building a wall or transporting a thing to a specified destination."[80] Properties delivered to a common carrier are classified as a deposit (*wadīʿa*) or as a trust (*amāna*), and the common carrier is termed an *amīn* (trustee). From the *Sharīʿa* point of view, the trustee is not accountable for the loss of or damage to the shipped property unless it results from misconduct or negligence on his part.

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[74] *Ibid.*, 4:202, Digest XIV, 1, 1, 12; Digest XIV, 1, 1, 13.
[75] *Ibid.*, 4:201, Digest XIV, 1, 1, 9; 4:205, Digest XIV, 1, 7.
[76] *Ibid.*, 4:204, Digest XIV, 1, 1, 24.
[77] Watson, *Digest of Justinian*, Digest IX, 3, 6, 3.
[78] Ashburner, *op. cit.*, clx.
[79] Scott, *op. cit.*, 3:138, Digest IV, 9, 7: "If he (shipmaster) gives warning that every passenger must be responsible for his own property, and that he will not be liable for damage, and the passengers agree to the terms of the warning, he cannot be sued."
[80] Noble, "Principles of Islamic Maritime Law," 150–151; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 109–110.

Therefore, the common carrier must take all practical steps to assure that the cargo entrusted to him is delivered safely to its destination. In principle, where there has been no negligence or transgression on the part of the ship owner or master, there can be no liability for loss or damage. However, liability can be incurred by either if the damage or loss arises from carelessness or neglect.[81] As a result, placing absolute liability in the leasing contract on either party is legally forbidden. Mālik rules: "If the ship owners/carriers stipulate not to be held liable for the foodstuffs, but for that which is not guaranteeable, then their stipulation is invalid and the contract is void. Had they concluded [such a deal], they assume liability for foodstuffs only and the ship owner/carrier collects a comparable freight disregarding the contract stipulations."[82] The ship owner's/carrier's liability is limited to wrongful acts and transgressions. Unforeseeable damages from such irresistible forces such as hostile attacks or rough seas, preclude liability on the part of the ship owners.

A ship owner, as an *ajīr mushtarak*, is normally held responsible not only for his own negligence, but also for that of the *ajīr khāṣṣ*[83]—master, crew, or servants—if the wrongdoer committed his act in the course of his employment. This is vicarious liability because it follows from the ship owner's capacity as employer. The principle of vicarious liability is derived from the Prophetic tradition stating that "profit follows responsibility."[84] Specifically, the ship owner is fully liable for acts of his crew if they followed their employer's instructions and orders and, in so doing, caused damage to the goods shipped. Accordingly, a plaintiff need not prove negligence on the part of the ship owner, but only that a contract of employment existed between the wrongdoer and the ship owner.[85] In sum, responsibility

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[81] Noble, "Principles of Islamic Maritime Law," 152–157; Ibn Fāyi', *Aḥkām al-Baḥr*, 356–359; Ṭāher (ed.) *op. cit.*, 39, the ship owner is held liable for intentional damage to cargo based on market prices at his most distant destination, providing the lessee pays the whole freight.

[82] Ṭāher (ed.) *op. cit.*, 41; Saḥnūn, *Al-Mudawwana*, 4:491; Qarāfī, *Al-Dhakhīra*, 5:529. Mālik's judgment apparently relies on Qur'ānic prohibition, which enjoins people not to exert themselves. *Qur'ān* 2:286 states: "On no soul doth Allāh place a burden greater than it can bear. It gets every good that it earns." (Pray:) "Our Lord! Condemn us not if we forget or fall into error. . . ."

[83] *Ajīr khāṣṣ* is characterized as a servant exclusively at the service of one employer.

[84] Noble, "Principles of Islamic Maritime Law," 163: "*Al-kharāj bil-ḍamān aw al-ghurm bil-ghurm.*"

[85] *Ibid.*, 162. On p. 164, she argues that the Ḥanafite jurists lay the liability for the damage to or loss from the cargo upon the hireling who committed the wrongdoing rather than the employer.

follows ownership. For that reason, the A. S. enjoins shippers not to entrust their cargoes to untrustworthy carriers, but to deliver them to faithful and professional ship owners, who must ensure that: (a) their ships are well equipped and seaworthy and (b) they hire experienced and trustworthy crew to navigate them.[86] In a case where two or more persons own a ship, they are held answerable for the wrong acts of their seamen in proportion to their shares.[87] The only circumstance where a shipmaster is solely accountable for loss or damage is when he improperly takes over a ship and subsequently collides with another. This rash act on his part exempts the ship owner from liability.[88]

With regard to liability based on fault, the law distinguishes between liability arising from an act contrary to a contract (*ḍamān al-ʿaqd*), and liability arising from an unlawful act (*ḍamān al-fiʿl*).[89] The ship owner is not liable, however, for the losses caused by forces of nature.[90] Furthermore, intentional wrongdoing on his part or that of the crew obliges him to remunerate the merchant. If the ship owner can prove that the damage was unavoidable, he is absolved of responsibility.[91] Similar to the edict established by Digest IV, 9, 7, a ship owner can also free himself from responsibility if the merchant or his agent accompanies the shipment or sails on another ship in the convoy.[92] Nevertheless, the ship owner is bound to carry the shipment safely and deliver it at the journey's end in the state in which he received it and must not sell or steal any part of the shipment.

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[86] Ṭāher (ed.) *op. cit.*, 38.

[87] Noble, "Principles of Islamic Maritime Law," 166.

[88] *Ibid.*, 170; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 381–384.

[89] Noble, "Principles of Islamic Maritime Law," 170–171.

[90] *Ibid.*, 176–179; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 112–114; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 360–367.

[91] Ṭāher (ed.), *op. cit.*, 38–39; Saḥnūn, *Al-Mudawwana*, 4:494–495; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:58; Muḥammad Ibn Ibrāhīm Ibn al-Mundhir al-Nīsābūrī, *Al-Ishrāf ʿalā Madhāhib Ahl al-ʿIlm* (Qaṭar: Dār al-Thaqāfa, 1986), 1:326–237; Sarakhsī, *Al-Mabsūṭ*, 16:10; Abū Jaʿfar Muḥammad Ibn al-Ḥasan Ibn ʿAlī al-Ṭūsī, *Tahdhīb al-Aḥkām* (Al-Najaf: Dār al-Kutub al-Islāmiyya, 1959), 7:216–217; Abū Jaʿfar Muḥammad Ibn Manṣūr Ibn Aḥmad Ibn Idrīs al-Ḥillī, *Kītāb al-Sarāʾir* (Qumm: Mu"assasat al-Nashr al-Islāmī, 1989), 2:470; Ibn Nujaym al-Miṣrī, *Al-Baḥr al-Rāʾiq Sharḥ Kanz al-Daqāʾiq* (Cairo, 1894), 8:31–33; Muḥaqqiq al-Thānī, *Jāmiʿ al-Maqāṣid fī Sharḥ al-Qawāʿid* (Beirut: Mu"assasat Āl al-Bayt, 1991), 7: 298.

[92] Ṭāher (ed.), *op. cit.*, 42; Saḥnūn, *Al-Mudawwana*, 4:494; Sarakhsī, *Al-Mabsūṭ*, 16:10; Rafīʿ, *Muʿīn al-Ḥukkām*, 2:527; Wansharīsī, *Al-Miʿyār*, 8:322; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 372–374.

If he does, the merchant is either entitled to receive goods of the same kind, quality and quantity, or an equivalent sum of money based on market price at the destination [*bil-balad al-aqṣā al-ladhī ʿalayhi an yablughahu ilayhi*].[93]

Besides the circumstances that make ship owners liable for loss of or damage to cargo, chapter six of the A. S. describes the types of foodstuffs for which ship owners are held responsible. In principle, this applies to staples, which Muslim jurists classify into five categories: grains, legumes, shortening, dried foods, and salt. The ship owners are responsible for the safe delivery of certain grains, namely barley, wheat, rye, spelt, corn, and millet. The legumes include fava beans, lentils, chickpeas, black-eyed peas, and chickling vetch. Shortening consists of cooking fat, honey, oil, and vinegar. Dried foods include dates, raisins, and olives as well as spices. Fish, meat, and fresh fruit and vegetables are not included. In cases of loss or damage, the ship owner has to provide decisive evidence to support his testimony regarding the quantity and original conditions of the foodstuffs.[94]

On the whole, the principles of ship owner liability established in the Digest found their way into early Islamic jurisprudence. Both of these separate legal systems, for the most part, hold the ship owner responsible for the acts of his crew, except if the master commandeers the vessel or intentionally disobeys the owner's orders. Owner liability extends to passengers, who must abide by the captain's safety regulations and instructions. Furthermore, the Digest and the A. S. both clearly state that as long as a shipper accompanies his cargo, the ship owner and/or master are both exempt from liability on the grounds that the former is taking care of his shipment. Obviously, when a ship has co-owners, all the shareholders are held accountable to passengers and shippers for property damage or loss.

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[93] Ṭāher (ed.), *op. cit.*, 38–39; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:135–137. On theft on board Islamic ships, consult Khalilieh, *Islamic Maritime Law*, 157–159; Noble, "Principles of Islamic Maritime Law," 89–90; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 573–579. In a letter dated 1010, ʿAlūsh Ibn Joshuʿa al-Andalusī describes to Ismāʿīl Ibn Abraham how some bales were stolen from a merchant ship, whose owner paid the value of the stolen bales to their owners. Subsequently, when the bales were recovered, the merchant refunded the ship owner and paid the shipping charges in full. See Gil, *op. cit.*, 2:618–619 [212], JNUL 4°577.3, f. 12.

[94] Ṭāher (ed.), *op. cit.*, 38–43.

Payment of Freight Charges

When the captain Aurelios Herakles of Antaeopolis signed a ship-leasing contract with Aurelios Areios Herakleides, senator of Arsinoe, to transport two hundred *artaba*s of vegetable seeds from Arsinoe to Oxyrhnchos, they agreed upon a freightage sum of one hundred silver drachmas; forty silver drachmas to be paid in advance and the rest upon completion of the freight carriage.[95] Customarily in the Mediterranean Sea, ship owners collected a down payment upon signing a contract or prior to the departure date. This custom was codified in the Romano-Byzantine Digest and the N. N., allowing the shipmaster to collect half of the *neuron* (freight charges) in money or in kind before the ship set sail, on the condition that the remaining amount be paid at the journey's end.[96]

Within the first century and a half after Islam's appearance in the Mediterranean world (12 A.H./634 C.E.), Muslim jurists, particularly the Mālikīs, instituted various forms of freight charges. One group authorized the ship owner/carrier to collect payments due him at his convenience, *i.e.* upon signing the contract, before the departure, after reaching the destination, or in installments.[97] Similar to the provisions of the N. N., the great majority of Geniza business letters show that ship owners/carriers collected half the freight prior to departure, while the shipper disbursed the other half of the freight charges upon delivery of his goods.[98] A second group of hold-

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[95] Kenyon and Bell, *Greek Papyri in the British Museum*, 3:220, Oxy. 948.

[96] Letsios, *Das Seegesetz der Rhodier*, 89, 101–102, 162, 261–262; Ashburner, *op. cit.*, 98, Article III:20: "If the hirer provides the goods . . . let him give the half of freight to the captain"; p. 103, Article III:24: "The captain takes the half-freight and sails." On p. cxc, Ashburner proposes that the transportation costs were determined by the space the goods occupied, their weight was a secondary consideration. By 538 or 539, the fee for transporting grain from the granaries of Alexandria to Constantinople was one *solidus* per 100 *modii*. See Sirks, *Food for Rome*, 125, 194, 203, 211–212. On p. 232, note 105, the author suggests that unlike public service where ship owners collected a rate fixed by the government, lessors could obtain more favorable and higher freightage from private transporters.

[97] Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:447; Abū al-Qāsim Muḥammad Ibn Aḥmad Ibn Juzayy, *Al-Qawānīn al-Fiqhiyya* (Tunis: Al-Dār al-ʿArabiyya lil-Kitāb, 1982), 281; Rafīʿ, *Muʿīn al-Ḥukkām*, 2:525; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Ibn Salmūn, *Al-ʿIqd al-Munzzam*, 2:3–4; Minhājī, *Jawāhir al-ʿUqūd*, 1:293–294; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 437–444.

[98] Norman R. Stillman, "East-West Relations in the Islamic Mediterranean in the Early Eleventh-Century—A Study in the Geniza Correspondence of the House of Ibn ʿAwkal" (Ph.D. diss., The University of Pennsylvania, 1970), 412–415. Goitein,

ings permitted the ship owner/carrier to collect the sum due him only after delivering the shipment safely at the destined port.[99] Other opinions allowed for hiring of a vessel only if the freight charges were paid immediately and nullified the contract if the shipper insisted on delaying the shipping fees until the journey's end.[100] These holdings

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"Jewish Trade," 186–188, TS Arabic 53, f. 51; Ben-Sasson, *op. cit.*, 68, 71–72 [12], Dropsie 389, ll. 41–42, (right margin) ll. 22–23, *v.*, l. 11; 522 [105], TS 12.366*v.*, ll. 3–5; Gil, *op. cit.*, 2:531 [181], TS 13 J 17, f. 3, l. 31; 2:538–539 [183], Mosseri V 340, ll. 4–6; 2:541 [184], Bodl. MS Heb. d 47, f. 62, l. 5; 2:558 [190], Bodl. MS Heb. c 27, f. 82, l. 20; 2:621 [212], JNUL 4°577.3, f. 12, l. 34; 2:821 [275], TS NS 83.3, c, l. 6; 2:911 [299], TS Arabic 51.87, c, ll. 16, 19; 3:200 [364], TS 16.263 and TS 8 J 24, f. 10, l. 12; 3:261 [375], TS 8 J 25, f. 11, ll. 5–11; 3:263 [376], ENA NS 8, f. 4*r.*, l. 6; 3:265 [376], ENA NS 8, f. 4*v.*, l. 13; 3:481 [446], ULC Or 1080 J 37, l. 12; 3:615–616 [485], TS 12.545*v.*, l. 1, 3, 5–7, 10, 12, 13, 14, 15, 19; 3:622–623 [486], ULC Or 1080 J 79*v.*, l. 8; 4:443 [748], Bodl. MS Heb. a 2, f. 20, l. 13; 4:568 [788], Bodl. MS Heb. a 2, f. 19, l. 14; 4:572 [789], AIU A 70, ll. 29–30; 4:632 [814], TS 12.28, l. 3; 4:692 [835], TS AS 153.14, l. 9.

[99] Ṭāher (ed.), *op. cit.*, 26; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:150; Rafīʿ, *Muʿīn al-Ḥukkām*, 2:525; Ibn ʿĀṣim, *Tuḥfat Ibn ʿĀṣim*, 580–581; Minhājī, *Ǧawāhir al-ʿUqūd*, 1:293–294; Goitein, "Jewish Trade," 378–379, TS Arabic 53, f. 51, ll. 10–16; Ben-Sasson, *op. cit.*, 68–75 [12], Dropsie 389, ll. 41–42, 47, 78, (right margin) ll. 5, 12, 21*v.*, ll. 24, 26; 203–204 [51], TS 13 J 29, f. 9, ll. 4–5; 235 [57], Bodl. MS Heb. d 66, f. 15, l. 5; 244 [59], TS K 3.36, ll. 1–2; 506 [103], TS 20.69*v.*, l. 27; Gil, *op. cit.*, 3:215 [367], TS 20.71, l. 5; 3:264 [376], ENA NS 22, f. 25*r* and ENA NS 8, f. 4*r*, l. 12; 3:536 [460], Mosseri II 128*v.*, l. 2.

[100] Ṭāher (ed.), *op. cit.*, 26; Abū ʿUmar Yūsuf Ibn ʿAbd Allāh Ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīna al-Mālikī* (Riāḍ, 1980), 2:752; Minhājī, *Ǧawāhir al-ʿUqūd*, 1:293–294; Wansharīsī, *Al-Miʿyār*, 8:64; Christides, "Raid and Trade," 82; Stillman, "East-West Relations in the Islamic Mediterranean," 412–415. Goitein, "Jewish Trade," 186–187, TS Arabic 53, f. 51, ll. 4–9; Ben-Sasson, *op. cit.*, 73 [12], Dropsie 389*v.*, l. 42; 161 [38], TS 20.152, l. 13; 195 [49], TS 13 J 17, f. 3, l. 25; 221 [54], Bodl. MS Heb. d 65, f. 17, (right margin) l. 2*v.*, l. 1; 230 [56], TS 10 J 19, f. 19, l. 23; 262 [63], TS 20.76*v.*, ll. 2–3; 270 [64], TS 16.7*v.*, l. 10; 277 [65], Bodl. MS Heb. c 28, f. 61, ll. 33–34; 522 [105], TS 12.366*v.*, l. 4; 630 [126], ENA 3014.3, l. 20; Gil, *op. cit.*, 2:327 [116], TS12.556*v.*, l. 3; 2:381 [134], ULC Or 1080 J 291, c, ll. 8, 13, 17, 23; 2:384 [135], TS Box J 1, f. 54, c, l. 17; 2:397 [138], TS Misc 25.133*v.*, (upper margin) ll. 1–2; 2:401 [141], TS 10 J 25, f. 1, l. 11; 2:527 [180], TS 10 J19, f. 19*v.*, l. 23; 2:578 [195], Bodl. MS Heb. d 65, f. 18, l. 19–21; 2:594 [201], TS 10 J 6, f. 1, c, l. 9; 2:817–819 [274], TS Box K 15.53, a, ll. 15–16, b, ll. 3–4, 9–10, c, ll. 9–12, 15–16, d, ll. 1, 10–11; 3:11 [307], ENA 2805, f. 16 B, ll. 7–8; 3:98 [334], TS Misc 28.240, l. 11; 3:103–105 [336], TS Arabic 30.92, b, l. 15, c, l. 16, d, ll. 14–15; 3:140 [347], ULC Or 1080 J 36*v.*, l. 16; 3:192 [363], TS 16.264, l. 3; 3:199 [364], TS 16.263 and TS 8 J 24, f. 10, ll. 7–8, 3:202–203 [364], *v.*, l. 6; 3:256 [374], TS 12.226, l. 23; 3:262 [375], TS 8 J 25, f. 11, l. 18; 3:298 [382], ENA 2805, f. 19, ll. 20–21; 3:312–313 [387], BM Or 5544, f. 6, ll. 21–22; 3:334 [392], TS 10 J 9, f. 3, ll. 16–17; 3:358 [400], TS 13 J 17, f. 2, l. 7; 3:455 [436], TS 8 J 25, f. 13, l. 18; 3:616 [485], TS 12.545*v.*, l. 12; 3:907–908 [575], TS 10 J 20, f. 10, ll. 16, 23; 3:979 [596], ENA 2805, f. 6 B, (upper margin) ll. 15–18; 4:86 [629], TS 8 J 26, f. 4*r.*, l. 18; 4:150 [647], Gottheil and Worrell, 36, ll. 25, 37; 4:334 [706], TS 12.369, l. 12; 4:355 [713], TS 8 J 28,

disregarded local custom, if it permitted such a delay, reasoning that travel on the high seas was risky and neither ship owner nor shipper could guarantee the safe delivery of the consignment at the prescribed point; accordingly, they required that the charges be paid before the ship sailed, either in cash or in kind.[101] The option of credit payment is rarely mentioned in jurisprudential literature, which emphasized that transportation expenses had to be paid prior to sailing with the understanding that the shipper could not order the shipmaster to sail in "unfavorable weather conditions and rough sea which could create an unsafe passage."[102]

Whereas the N. N. and A. S. shed scarcely any light on the calculation of transportation fees, Cairo Geniza commercial accounts from the tenth and eleventh centuries go into shipping costs and procedures in minute detail.[103] In addition to considering transportation fees, a ship's technical condition, the crew, the distance (from port of origin to destination), and cargo volume and weight, the shipper had to make allowance for loading and unloading expenses and the seamen's gratuities, at the same time planning the ship's course and departure date.

The ship owner's/carrier's responsibility for the safekeeping of cargo began from the moment he received it,[104] and, as noted, the shipper had to pay for loading. Sixth century Romano-Byzantine edicts affirm this legal position, ruling that a ship owner receives the fees for transporting passengers with their personal effects and merchandise.[105] Correspondingly, letters of the classical Geniza traders concur that shippers paid the expenses for lading the goods.[106] Neither

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f. 8, (right margin) l. 3; 4:410 [738], TS 12.229, l. 15; 4:568 [788], Bodl. MS Heb. a 2, f. 19, l. 13; 4:571 [789], 574, AIU A 70, l. 16*v*., ll. 11–12; 4:613 [806], Gottheil and Worrell, 22, l. 6.

[101] Ṭāher (ed.), *op. cit.*, 17–18; Saḥnūn, *Al-Mudawwana*, 4:410; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:132–133; Ibn ʿAbd al-Barr, *Al-Kāfī*, 2:752; Rafīʿ, *Muʿīn al-Ḥukkām*, 2:525; Wansharīsī, *Al-Miʿyār*, 8:64; 9:117; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 451–454.

[102] Ṭāher (ed.), *op. cit.*, 20.

[103] Goitein, *Mediterranean Society*, 1:342. He enumerates 45 government duties and unofficial payments and gratuities the merchant pays in a circular business transaction.

[104] Scott, *op. cit.*, 3:136, Digest IV, 9, 1, 8.

[105] *Ibid.*, 3:137, Digest IV, 9, 4, 2; Digest IV, 9, 5.

[106] Gil, *op. cit.*, 3:11 [307], ENA 2805, f. 16 B, l. 8 (*rufūʿ*); 3:67 [324], TS Arabic 30.2, l. 8 (*shukhūṣ*); 3:261 [375], TS 8 J 25, f. 11, ll. 5, 7, 8, 9, 11 mention the sum payable for loading (Arabic *rafʿ*) cargo in different ships; 3:334 [392], TS 10 J 9, f. 3, l. 16; 4:149 [647], Gottheil and Worrell, 36, ll. 13, 16.

Byzantine nor Islamic maritime laws require a shipmaster to move cargo to warehouses unless the local custom and contract terms so stipulate.[107] This suggests that the ship owner's accountability for the cargo ended when the vessel moored at the unloading terminal of the port of final debarkation, and that the shipper then assumed task of discharging and warehousing the cargo.[108]

Geniza merchants usually preferred to transport shipments directly from their points of origin inland to Mediterranean ports for three reasons. They thereby avoided any intermediate stopovers and thus additional expenses for hiring porters, seamen, ship owners, and port fees, especially if the ship made numerous stops in inland harbors,[109] as well as damage to or theft of part of the cargo during transshipping. They also could avoid missing the navigation season, particularly when cargo was transferred at the end of the sailing season.[110] Moreover, in wartime and in pirate-infested regions, transportation fees increased since ship owners and traders had to pay tribute (*ghifāra*) to protect their vessels and cargoes against attacks.[111] This happened,

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[107] Ashburner, *op. cit.*, cxcvii; Wansharīsī, *Al-Miʿyār*, 8:301.

[108] Gil, *op. cit.*, 2:803 [270], TS Arabic 30.123, l. 10; 2:806 [271], TS Arabic 30.127*v.*, l. 3 "unloading duties (*ḥaqq nuzūl*)"; 2:866 [288], ULC Or 1080 Box 15, f. 68, l. 6: "three and a quarter *dirhams* were paid for unloading (*tafrīgh*)"; 3:102 [336], TS Arabic 30.92, b, l. 7 ["*nuzūl*"]; 3:137 [346], Mosseri IV 79*v.*, ll. 4–5 (*ramyy*); 3:240 [372], TS 13 J 23, f. 18, ll. 17–18 (*tafrīgh*); 3:258 [374], TS 12.226*v.*, ll. 10–11; 3:262 [375], TS 8 J 25, f. 11, l. 8. Maritime practices in the Islamic Mediterranean during the classical period differed from region to region. Whereas the Andalusian custom required the owner of a large vessel to provide a lighter one to bring cargo and passengers ashore, al-Makhzūmī reports that the Egyptian port authorities were responsible for conveying the cargo and passengers to the quay as part of the port services. See Ibn ʿAbdūn, *Seville musulmane*, 63; Makhzūmī, *Kharāj Miṣr*, 25; Ṣafāʾ ʿAbd al-Fattāḥ, *Al-Mawānīʾ wal-Thughūr al-Miṣriyya min al-Fatḥ al-Islāmī ḥattā Nihāyat al-ʿAṣr al-Fāṭimī* (Cairo: Dar al-Fikr al-ʿArabī, 1986), 160.

[109] Goitein, *Mediterranean Society*, 1:319; Makhzūmī, *Kharāj Miṣr*, 11–13 esp. 24–28; Shammākhī, *Īḍāḥ*, 3:580–581; Wansharīsī, *Al-Miʿyār*, 8:300.

[110] Ṭāher (ed.), *op. cit.*, 44; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:78; Kindī, *Al-Muṣannaf*, 21:153.

[111] Gil, *op. cit.*, 3:169 [354], TS K 2.32, i, l. 4. In a lengthy account from 1055, Barhūn Ibn Mūsā Tāhertī makes a clear distinction between the freightage and protection: "He had to pay for the freightage and protection in order to sail (from Sfax) for al-Mahdiyya (*wa-ʿalayhi mā yalzamuhu kirāʾ wa-ghifāra ilā al-Mahdiyya*)"; 4:86 [629], TS 8 J 26, f. 4*r.*, l. 18: "deducting the freightage, protection, and brokerage"; 4171–172, TS 16.13, ll. 22–24. The writer Haim Ibn ʿAmmār Madīnī (*i.e.*, of Palermo) reports to Joseph Ibn Mūsā Tāhertī about selling two of his own bales of flax to pay tribute to the Jabbāra and save the remaining shipment. Apparently lessees and lessors shared the expenses of protection when sailing between Barqa and Tunis, a coastal strip governed by the Jabbāra privateers. Such guardianship might be termed as 'regional protection'. Besides this sort of protection, Muslim

for instance, in the coastal region between Barqa and Ifrīqiya, where commercial ships bound for the Maghrib paid a tribute to Jabbāra privateers.[112]

Transportation fees decreased as the sailing season neared its end. With the return of commercial vessels to the port of origin, ship owners lowered the freight rates to attract more clients. The costs of transport were higher, however, at the height of the season when the trunk routes were safe.[113] Moreover, in wartime or when commercial ships were unavailable and merchants and other people urgently sought to flee or to move cargoes, transportation charges increased dramatically. That happened during the Norman invasion of Sicily in 1065, after which transportation charges for passage from Sicily to Ifrīqiya doubled and even tripled.[114]

Freightage and advance payments were usually fixed in accordance with the standard rate at the port of origin on the day the contract was signed. So long as the ship owner/carrier safely conveyed the cargo to its ultimate destination, the shipper had to disburse the agreed sum according to the contract terms, regardless of whether he used the entire space hired on board or only part of it,[115] providing that both parties acknowledged the payment in writ-

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central and provincial authorities could protect commercial fleets from pirates either with naval escorts, or by means of the coastal fortification system known as *ribāṭ*s and *miḥrāse*s. For further details, see Khalilieh, "*Ribāṭ* System," 212–225; *idem*, "Security Protection and Naval Escort," 221–232. In fact, the Digest warns provincial governors against hindering coastal navigation. It warns them to secure the coastal trunk routes and prevent fishermen from showing lights at night, which might mislead seamen and endanger the ship with her cargo. See Scott, *op. cit.*, 10:305, Digest XLVII, 9, 10; Starr, "Coastal Defense in the Roman World," 56–70; Philip de Souza, *Piracy in the Graeco-Roman World* (Cambridge: Cambridge Univesrity Press, 1999), 206.

[112] Goitein, *Mediterranean Society*, 1:327–328; Gil, *op. cit.*, 3:535 [460]; 3:767–768 [530], AIU VII E 5, ll. 19–22; Ben-Sasson, *op. cit.*, 48–54 [9], Mosseri II, 128 (L 130), ll. 15–18; 350–358 [78], TS 16.13*v*., l. 22; Khalilieh, *Islamic Maritime Law*, 72–73.

[113] Ben-Sasson, *op. cit.*, 568–574 [115], CUL OR. 1080 J 13, ll. 9–11.

[114] *Ibid.*, 48 [9], Mosseri II, 128 (L 130), ll. 17–18; 221 [54], Bodl. MS Heb. d 66, f. 17, (right margin); 221 [54], Bodl. MS Heb. d 65, f. 17*v*., l. 1, the merchant paid an extra 9% of the customary charges to transport his cargo since commercial ships were unavailable.

[115] Scott, *op. cit.*, 4:212, Digest XIV, 2, 10, 2; Justice, *General Treatise*, 100; Freshfield, *Manual of Later Roman Law*, 200; Dareste, "*Lex Rhodia*," 17; Letsios, *Das Seegesetz der Rhodier*, 262; Ashburner, *op. cit.*, 103, Article III:23: ". . . if the merchant does not provide the cargo in full, let him provide freight for what is deficient, as they agreed in writing." Evidently classical Muslim jurists held a similar opinion and required merchants who breached the contract in the last moment for no compelling reason

ing before witnesses.[116] Romano-Byzantine and Islamic maritime laws did not oblige the ship owner to inquire into the financial resources of the shipper. As a result, if the shipper were insolvent and unable to pay the duty charges, the owner of the vessel had the right to seize the shipment until he collected the fees owed him. In addition, pledging the commodities to the ship owner was apparently a legal act that took place prior to sailing. Usually the quantity of goods bestowed on the ship owner/carrier did not exceed what he would earn for his service.[117] Geniza letters report several incidents where ship owners refrained from unloading and releasing consignments until the shipping fees had been paid in full. There are recorded cases in Alexandria in 1057, and in Sfax on September 7th, 1064, when ship owners/carriers refused to release shipments and insisted on collecting the remaining half-freight before discharging them.[118]

Factors Affecting Freightage

Although the previous discussion outlines Byzantine and Islamic payment procedures in theory, it does not provide practical responses to possible complications between the contracting parties at the loading berth, during the maritime venture or after arriving at the destination. Put differently, in what circumstances would the shipper have to pay part or full freight? Did the carrier have to deliver the cargo safe and sound from the perils of the sea in order to still receive full freight? And was the carrier entitled to collect full freight

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or did not deliver the cargo at the agreed port of embarkation, to pay the ship owner all freight charges. See Khalilieh, *Islamic Maritime Law*, 77–78.

[116] Adolf Grohmann, *From the World of Arabic Papyri* (Cairo: Al-Maʿārif Press, 1952), 153–154, [PER Inv Ar. Pap. 560]. A papyrus dated to the third century of *Hijra*/ninth century C.E., reads: "(1) In the name of God, the Compassionate, the Merciful! (2) There has come to Hor, the sailor, twenty-one (3) *waiba*s of beans according to the merchant's *waiba* (4) on Friday morning. (5) Salam Ibn Ayyūb is witness thereto (6) in his [own] handwriting." It is reasonable to surmise that this practice prevailed in Romano-Byzantine Egypt, although so far I have not come across a supporting document. *Waiba* (*wayba*) is a measure of wheat, 15 liters, 4 gallons.

[117] Scott, *op. cit.*, 4:209, Digest XIV, 2, 2, 6: "If any of the passengers should be insolvent, the loss resulting from this will not be suffered by the master of the vessel; for a sailor is not obliged to inquire into the financial resources of everybody." As for Islamic law, consult Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 10:75; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 10:547–548; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 447–449.

[118] Gil, *op. cit.*, 3:491 [448], ULC Or 1080 J 167 (upper margin); 4:459 [751], Dropsie 389, ll. 41–43.

even if the ship encountered manmade dangers or bad weather and therefore could not make her way to the final destination? These and other issues will be in the course of a consideration of the factors affecting the charter agreement during the three stages of the voyage mentioned above.

I. *Loading Berth*

1. *Loading and Disposition of Cargo in the Ship*

The nature of a ship-leasing contract required the shipper to provide adequate and appropriate packing and containers to protect the items in transit against any damage by seawater. After customs appraisal,[119] their owner delivered the goods to the ship owner or his representative at the appointed place on the date fixed in the contract.[120] The ship's scribe registered their quantity, quality, and weight in the cargo/log book, and submitted a copy of the bill of lading to the shipper or his proxy. Thereafter, the carrier became liable for the safety of the goods, regardless of whether they still awaited loading or were already on board. He was exempted, however, from liability for any deterioration in unregistered commodities.[121] As the cargo was packed, the name of the carrier, the recipient, or

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[119] Steven Runciman, *Byzantine Civilization* (London, 1933), 170; Ahrweiler, "Fonctionnaires et bureaux maritimes à Byzance," 239–252; Kazhdan *et al.*, *Oxford Dictionary of Byzantium*, 1:566; Makhzūmī, *Kharāj Miṣr*, 20–22.

[120] Scott, *op. cit.*, 3:135–136, Digest IV, 9, 1, 6; Digest IV, 9, 1, 7; Ashburner, *op. cit.*, 102, Article III:22; Letsios, *Das Seegesetz der Rhodier*, 262; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:447; Ibn Salmūn, *Al-ʿIqd al-Munzzam*, 2:3–4; Minhājī, *Jawāhir al-ʿUqūd*, 1:94–96; Ibn al-Mughīth, *Al-Muqniʿ fī ʿIlm al-Shurūṭ*, 243–244; Marrākishī, *Wathā'iq al-Murābiṭīn al-Muwaḥḥidīn*, 470–472; Gil, *op. cit.*, 2:316 [113], Bodl. MS Heb. d 65, f. 17, l. 35, the sender Ephraim Ibn Ismāʿīl al-Jawharī instructs his addressee Jacob Ibn Joseph Ibn ʿAwkal not to 'linger on loading [the goods] at the early stage'. Such warnings were ordinarily issued at the beginning or end of the sailing season to avoid delays and increase profits, or to avoid the expenses entailed by detaining the vessel. 4:296 [693], TS 8 J 19, f. 25, ll. 13–14: "I was required to bring and lay [the cargo] nearby the vessel"; 4:676 [825], TS 13 J 17, f. 24, l. 9 refers to a lessor who was about to complete loading his cargo.

[121] Scott, *op. cit.*, 3:136, Digest IV, 9, 1, 8; Digest IV, 9, 3; 9:21, Digest XXXIX, 4, 11, 2, this section of the Romano-Byzantine law classifies them as smuggled merchandise unlawfully loaded on board. Besides sentencing the smuggler to death—be he the master, helmsman, pilot, or any seaman—the contraband is confiscated; Ashburner, *op. cit.*, clxxxviii; Ṭāher (ed.), *op. cit.*, 34, 37, Islamic law excludes them from the calculation of the general average in the event of jettison.

both (occasionally, too, the name of the merchant accompanying the shipment), religious formulae and identification marks of the merchant were inscribed on the packing case.[122] When registration was completed, both parties ascertained that the vessel was seaworthy, equipped with the proper nautical instruments and tackle, and watertight, *i.e.* coated with wax or tar, fish glue, and oil.[123]

Four fundamental factors were taken into account when placing the cargo in the ship: its bulk, its weight, its destinations, and the contract terms governed its handling. The heaviest items, like metals, ballast, and bagged goods (salt, grain, minerals, etc.), had to be stowed in the bottom of the hold to lower the ship's center of gravity and increase stability.[124] In addition, when a vessel hugged the coast and anchored at intermediate ports, the cargo had to be stowed so that it was accessible and easy to discharge. The shipment to be unloaded first had to be within reach on the upper deck, while cargo for the final terminal was stowed in the hold. This disposition prevented delays at ports of call, and cargo damage, especially to foodstuffs and perishable items.[125] As for contract terms, a more concerned

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[122] Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 15:375; Wansharīsī, *Al-Miʿyār*, 8:305; Khalilieh, *Islamic Maritime Law*, 78–79; Goitein, *Mediterranean Society*, 1:336–337; Gil, *op. cit.*, 2:720–721 [245], TS Misc 25.19 (upper margin) and (*verso*), l. 3. In a business letter dated to 1046, Nahray Ibn Nissīm instructs his addressee Salāma Ibn Nissīm al-Barqī to draw on the shipments' covers two Shields of David and two additional plant figures. The sender draws the marks accurately for the addressee to avoid any misunderstanding on the latter's part.

[123] Negligence on part of the ship owner to coat would make him responsible for cargo damage due to water leaks. See Articles III:10 and III:11; Letsios, *Das Seegesetz der Rhodier*, 206, 260; Ashburner, *op. cit.*, 91–92, Justice, *General Treatise*, 93–94; Freshfield, *Manual of Later Roman Law*, 197–198; Dareste, "*Lex Rhodia*," 11; Cecil, *Ancient Ships*, 34–35; Ṭāher (ed.), *op. cit.*, 14, 38–39; Sarakhsī, *Al-Mabsūṭ*, 16:10; Saḥnūn, *Al-Mudawwana*, 4:494–495; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:58; Nuwayrī, *Al-Ilmām*, 2:234; Ibn Mājid, *Al-Fawāʾid*, 239; Khalilieh, *Islamic Maritime Law*, 38. An identical rule pertaining to watertight vessels and legal consequences can be traced back to Babylonian laws. Charter 235 of Hammurabi's Code requires shipwrights and ship owners to caulk their vessels tightly and replace all rotted planks. The shipwright is required to give a guarantee for one year, in which a legal action can be brought against him in case of damage and shipwreck. See Driver and Miles, *Babylonian Laws*, 1:428–429.

[124] Casson, *Ships and Seamanship*, 175–182; Nuwayrī, *Al-Ilmām*, 2:234; Minhājī, *Jawāhir al-ʿUqūd*, 1:95; Ibn Bassām, *Nihāyat al-Rutba*, 157; Gil, *op. cit.*, 4:288 [691], TS 13 J 25, f. 8, ll. 8–9. The letter contains details of goods loaded in Cairo and shipped directly to Tripoli (Libya), and the recipient, Jacob Ibn Naḥum Ibn Ḥakmūn, reports to Nahray Ibn Nissīm how he could not discharge and sell the cargoes since 'they were placed behind the loads of other shippers'. Evidently heavy loads were stored at the bottom of the hold if they were to be discharged at the final terminal.

[125] Ṭāher (ed.), *op. cit.*, 44; Kindī, *Al-Muṣannaf*, 21:153; Rustāqī, *Manhaj al-Ṭālibīn*,

shipper merchant could stipulate that his cargo be stowed in the safest place on board, regardless of its weight.[126] As noted in Chapter Two, apart from his cargo, the shipper was required by maritime custom to bring with him, free of charge, his own food, water, clothing, bedding and the utensils needed for his voyage. The leasing contract obliged the ship manager to allocate space for the shipper merchant to sleep and store his belongings and daily victuals, but not in excess of his personal needs.[127]

The foregoing discussion portrays the system of loading hypothetically but lacks authentic legal solutions to complications at the port of embarkation, when the carrier or the shipper voluntarily declined to the load the cargo, when the ship was detained by the local authorities, or when she was exposed to hostile attacks and bad

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12:295. If failure to place the consignment appropriately resulted from the carelessness of both parties to the contract, they must compromise. The shipmaster could refuse the shipper's demand to unload his cargo at an early port of call if that would damage other shipments. The shipper has to appoint an agent to take care of the shipment, while the shipmaster, in return, has to sail back and unload it at the agreed destination.

[126] Ashburner, *op. cit.*, 102, Article III:22; Justice, *General Treatise*, 100; Freshfield, *Manual of Later Roman Law*, 200; Dareste, "*Lex Rhodia*," 17; Letsios, *Das Seegesetz der Rhodier*, 262; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Ibn Salmūn, *Al-ʿIqd al-Munzzam*, 2:3; Minhājī, *Jawāhir al-ʿUqūd*, 1:94–96; Ibn al-Mughīth, *Al-Muqniʿ fī ʿIlm al-Shurūṭ*, 242–244; Marrākishī, *Wathā'iq al-Murābiṭīn wal-Muwaḥḥidīn*, 471; Ben-Sasson, *op. cit.*, 194–199 [49], TS 13 J 17, f. 3, ll. 6–7; 229–233 [56], TS 10 J 19, f. 19, l. 10; Goitein, "Jewish Trade," 373, 378; *idem, Mediterranean Society*, 1:337–339; *idem, Letters*, 81, TS 12.224, ll. 15–19: "I wrote to the agent of the ship ʿAlī Abū Dhahab and also to her captain that all you wished with regard to the transport of your goods, heavy baggage and other, should be carried out in accordance with your instructions; they should receive the goods from your brother and from the [. . .] and the friends and keep them and put them on the best place aboard." Gil, *op. cit.*, 2:453 [155]; 3:264 [376], ENA NS 8, f. 4r, l. 11: "Regarding my two loads which were on the quayside, I loaded them in the first class aboard the vessel of Ibn al-Bawwā." One may assume that if the goods were stowed contrary to contract terms and were damaged or spoiled, the ship owner would have to compensate the shipper(s).

[127] Scott, *op. cit.*, 3:135, Digest IV, 9, 1, 6; 3:137, Digest IV, 9, 4, 2; 4:208, Digest XIV, 2, 2, 2; Ashburner, *op. cit.*, 58–61, Articles II:8–13; 102, Article III:22; Casson, *Travel in the Ancient World*, 154–155; Ṭāher (ed.), *op. cit.*, 31, 32, 33; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Ibn Salmūn, *Al-ʿIqd al-Munzzam*, 2:3–4; Minhājī, *Jawāhir al-ʿUqūd*, 1:94–96; Ibn al-Mughīth, *Al-Muqniʿ fī ʿIlm al-Shurūṭ*, 242–244; Marrākishī, *Wathā'iq al-Murābiṭīn wal-Muwaḥḥidīn*, 471; Kindī, *Al-Muṣannaf*, 18:53–54; Ibn Jubayr, *Riḥlat Ibn Jubayr*, 13; Ibn Mājid, *Al-Fawā'id*, 28, 239; Assaf, *Texts and Studies*, 136; Goitein, "Portrait of a Medieval India Trader," 460; *idem*, *Letters*, 306, 312, 334; *idem, Mediterranean Society*, 1:316; *idem*, "An Overseer of the Sultan's Ships," 275, 280, TS 24.78, ll. 49–53; Khalilieh, *Islamic Maritime Law*, 56–57. If it has been proven that a shipper carries a commercial quantity of provisions to be sold on board or at his ultimate destination, he must pay the ship owner freight for them.

weather, or was technically inoperable. Such obstacles could affect the fulfillment of a leasing transaction, rendering it impracticable or causing financial loss to either party. However, to avoid misunderstanding and misinterpretation of the law by either or both of them, Byzantine and Muslim law doctors employed different legal methods to define their rights and duties under such circumstances.

2. *Delay*

Historical documents from Romano-Byzantine and Islamic Egypt report that shippers habitually delivered their consignments at quayside and paid the ship owner/carrier for boarding and stowing them. A leasing contract from 236 C.E. stipulated that the ship owner load the cargo within two days "from the 25th of the month." Accordingly, the shipper had to deliver the consignment by the 24th, allowing the ship owner to stow the cargo in the ship between the 25th and 26th, and sail the next day for the destination. On the return voyage, the shipper would have had to pay additional fees "if the captain is detained longer [than four days]" by the shipper in port of final debarkation.[128] Comparable stipulations were made in Byzantine legal codices. The N. N. requires the contracting parties to fix loading and departure dates in their leasing transaction. Article III:25 fixes the period within which the shipper must bring the agreed upon cargo to the loading berth. If the shipper does not meet his obligation and exceeds the time limit by less than ten days, he must pay for the crew's rations. If there is a second delay, he can off-load after paying the full freight, and if he wishes to supplement the charter by proportionate though not necessarily equal payments, the voyage can proceed as agreed.[129] Where the shipper or his partner or proxy hinders sailing after the ten days of grace expire, the shipper must remunerate the ship owner in full if the vessel is lost by piracy, fire, or shipwreck.[130]

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[128] Kenyon and Bell, *Greek Papyri in the British Museum*, 220, Pap. 948. For the detention of a merchant vessel by the lessee in late eleventh century, see Gil, *op. cit.*, 4:149 [647], Gottheil and Worrell, 36, l. 17.

[129] Dareste, "*Lex Rhodia*," 19; Justice, *General Treatise*, 101; Ashburner, *op. cit.*, 103; Freshfield, *Manual of Later Roman Law*, 201; Letsios, *Das Seegesetz der Rhodier*, 157, 262.

[130] Article III:28; Dareste, "*Lex Rhodia*," 19; Justice, *General Treatise*, 103; Ashburner, *op. cit.*, 106–107; Freshfield, *Manual of Later Roman Law*, 201; Letsios, *Das Seegesetz der Rhodier*, 157–158, 263.

Similar loading regulations are reported in Islamic legal inquiries and in business accounts from the Cairo Geniza. They call for fixing the loading and departure dates on condition that the ship owner/carrier does not sail after sunset,[131] the trunk routes are safe, and natural factors beyond human control are not involved.[132] The shipper merchant customarily submitted his shipment at the embarkation terminal within a designated time period prior to the sailing date and disbursed the loading charges; Geniza traders called this *shukhūṣ*, *taʿbiya*, or *rafʿ*.[133] If the shipper caused a delay, he had to pay additional charges at the rate indicated in the agreement.[134] A shipper had to meet his obligations in accordance with contract provisions if his cargo was not ready at the place and time stated in the leasing agreement,[135] even if his shipment was stolen prior to or after it was stowed in the ship.[136] Another contemporary legal opinion dictates that the shipper had to indemnify the ship owner/carrier for part of the transportation fees since the vessel sailed empty for the port of embarkation. The partial compensation paid by the shipper only applied to the trip out from the port of origin.[137]

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[131] Gil, *op. cit.*, 4:194 [662], TS 8 J 24, f. 21, ll. 4–5: ". . . for the regulation prohibits departing after sunset, therefore we cannot disobey this restrictive law [*li-anna al-safar fī al-layālī al-qaḍā' wa-lam yakun safar: mā naqdir narfaʿ al-qaḍā'*]." The Greek geographer Strabo (63 B.C.–21 C.E.) notes a similar practice in the port of Caunus, in Lycia opposite Rhodes, c. 80 B.C. He writes: "The city (Caunus) has dockyards, and a harbour that can be closed." See Strabo, *Geography*, 6:265 [14.2.3].

[132] Ṭāher (ed.), *op. cit.*, 19; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Ibn Salmūn, *Al-ʿIqd al-Munzzam*, 2:3–4; Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:646, 648–650; Minhājī, *Jawāhir al-ʿUqūd*, 1:94–96; Ibn al-Mughīth, *Al-Muqniʿ fī ʿIlm al-Shurūṭ*, 242–244; Marrākishī, *Wathā'iq al-Murābiṭīn wal-Muwaḥḥidīn*, 471.

[133] Gil, *op. cit.*, 3:11 [307], ENA 2805, f. 16 B, l. 8; 3:67 [324], TS Arabic 30.2, l. 8; 3:261 [375], TS 8 J 25, f. 11, ll. 5, 7, 8, 9, 11; 3:384 [409], TS 12.362, l. 10 (*taʿbiyat al-matāʿ*); 4:149 [647], Gottheil and Worrell, 36, ll. 13, 16; 4:334 [706], TS 10 J 9, f. 3, l. 16.

[134] Gil, *op. cit.*, 4:149 [647], Gottheil and Worrell, 36, l. 17 refers to the additional expenses paid by the shipper for detaining the ship and mariners for two nights.

[135] Kindī, *Al-Muṣannaf*, 21:154–155. If the delay in sailing results from the ship owner, after the convoy of vessels has headed back and the sea has been closed, the merchant should be exempted from paying the transportation fee and be allowed to unload his shipment.

[136] A distinction must be made between cargo stolen by crew and other parties. In the former situation the responsibility is laid upon the employer, *i.e.*, ship manager or owner, for he is solely accountable for her safety if the merchant does not accompany his shipment. See Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:82–83; Ibn ʿĀṣim, *Tuhfat Ibn ʿĀṣim*, 580–581.

[137] Ḥasan Ibn Manṣūr al-Awzajandī, *Fatāwā Kāzī-Khān* (Cairo, 1865), 2:287; Ibn Nujaym, *Rasā'il*, 152–153.

As noted earlier, departure could not be delayed for personal or financial considerations. Byzantine and Islamic laws required a shipper to compensate a ship owner if he did not supply his cargo at the agreed embarkation point at the designated time, although their assessment of damages differed. The most significant difference between the two systems relates to attacks by pirates and enemies on ships anchoring at the port of origin or at any time during the carriage of goods. Byzantine jurists concluded that where the ship was lost due to piracy, fire or shipwreck, the shipper had to pay full compensation for damage to the ship. If a calamity befell the ship after the time designated for the voyage expired, all parties involved in the maritime venture paid contribution.[138] By contrast, under Islamic law, the parties to the contract were bound to be cautious and not to load or sail under threatening circumstances. Impending natural hazards and manmade dangers required cancellation of the contract and the return of the freightage to the shipper even if the cargo was already on board. Thus, a ship owner was liable for losses occasioned by pirates and enemies if he jeopardized the vessel and her contents by departing under unsafe conditions.[139]

Even though a ship owner/carrier was required by law to fulfill the leasing terms, the Cairo Geniza reports that he would occasionally refrain from sailing if he could not collect sufficient passengers and consignments to cover expenses. In such a case, an impatient shipper would either entrust his consignment to the captain or to another merchant or sail aboard a different vessel in order not to miss the trading season.[140] The contract nonetheless remained legally valid, although the ship owner had unilaterally changed its terms; but, so long as he had not performed his duty in transporting the property, the Digest rules, he was not entitled to collect freight charges from the shipper.[141] Muslim jurists ruled similarly and upheld leasing contracts without timetables, provided that service was guaranteed and the freight was not assigned to a particular vessel. Leasing a particular ship and paying freight charges in advance was lawful

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[138] Article III:29; Ashburner, *op. cit.*, 107; Justice, *General Treatise*, 102; Freshfield, *Manual of Later Roman Law*, 201; Dareste, "*Lex Rhodia*," 19; Letsios, *Das Seegesetz der Rhodier*, 157, 263.

[139] Ṭāher (ed.), *op. cit.*, 19–20; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228.

[140] Goitein, *Mediterranean Society*, 1:314, 481, note 9, doc. TS 10 J 10, f. 17, ll. 6–13.

[141] Scott, *op. cit.*, 5:84, Digest XIX, 2, 15, 6.

if the voyage was postponed for not more than two weeks.[142] Although the A. S. remains silent as to penalties imposed on the ship owner for not fulfilling contract terms, it seems safe to assume that individual contracts penalized violators.

3. *Dereliction*

A ship owner/carrier sometimes left behind goods accepted as freight and instead conveyed the goods of another merchant. Muslim jurists issued varied opinions on this situation, according to which the owner of the transported goods could choose either to receive an equivalent value for his consignment, based on its current price at the town of origin, or to take it back from the place to which it was transported, or to have it brought back to the port of origin; in all cases, the shipper owed the carrier no fee at all. However, some jurists ruled that the shipper could receive his shipment and pay the transportation fees; others ordered the carrier to return the shipment to the embarkation point without charging its owner. Under all of these circumstances, the leasing agreement remained valid.[143]

Apart from unilateral abrogation of the contract by the shipper, in which case the law obliged him to remunerate the ship owner/carrier, Muslim *fuqahā'* unanimously required the ship owner/carrier to refund the shipper if his shipment was still in the port of embarkation. Byzantine jurists, on the other hand, allowed the ship owner to retain half of the freight if the shipper did not fulfill his contractual commitment, regardless of whether the ship hired was available at the embarkation point or on her way there. The only cases where the ship owner/carrier had to remunerate his shipper(s) were when a ship in question was wrecked or damaged due to the negligence of the captain and crew, or the carrier wished to breach the contract, or the contract stipulated such a penalty.[144]

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[142] Ṭāher (ed.), *op. cit.*, 20–21; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228; Qarāfī, *Al-Dhakhīra*, 5:485; Wansharīsī, *Al-Miʿyār*, 9:117; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:499–501.

[143] Ṭāher (ed.), *op. cit.*, 51; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:108; Ibn Rushd, *Masā'il Abī al-Walīd Ibn Rushd* (Beirut: Dār al-Jīl, 1993), 2:1121; *idem*, *Fatāwā*, 3:1541–1542; *idem*, *Al-Bayān wal-Taḥṣīl*, 9:135–137; Qarāfī, *Al-Dhakhīra*, 5:491; Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:648–649. An identical rule is cited in the *Customs of the Sea*. See Sir Travers Twiss, *Monumenta juridica: The Black Book of the Admiralty* (Wiesbaden: Kraus Reprint, 1965), 3:121–137.

[144] N. N., Article III:27.

4. *Detention*

As long as the ship was still at anchor in the port, her captain did not enjoy exclusive jurisdiction over the craft, crewmen, and contents. Rather he shared cojurisdiction with the local authorities who in an emergency can seize the ship, recruit her crew or confiscate her contents. Legal inquiries from the Digest confirm this position and require the ship owner to comply with imperial orders, unload the shipments, re-equip his vessel and place her at the disposal of the government irrespective of his commitment to the shippers; noncompliance with the imperial decree meant confiscation of the craft.[145] Such an order, given abruptly, could generate legal disputes between the contracting parties, raising three major issues. First, did the contract remain valid until the provincial or imperial authorities released the vessel in question? Second, did the carrier have to provide a substitute vessel and transport the shipment to its destination? Third, and most importantly, was the shipper obliged to pay for the freight even if his goods had not been transported to the destined port? Answers to these questions can be found in an inquiry addressed in the Digest XIX, 2, 61, 1:

> A man leased for a certain sum a vessel to sail from the province of Cyrene[146] to Aquileia,[147] it being loaded with three thousand measures of oil and eight thousand bushels of grain. It happened, however, that the vessel, while loaded, was detained in said province for nine months, and the cargo was confiscated. The question arose whether the owner

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[145] Scott, *op. cit.*, 12:17, CJ 1.2.10; 15:165, CJ 11.1.8.

[146] Cyrene, a Hellenic city in present-day Libya, was founded c. 630 B.C. as a colony of the Greek island town Thera. In 322 B.C., Cyrenaica came under the control of the Greek general Ptolemy I and his dynasty, who ruled from Alexandria in Egypt. In 96 B.C., the Romans conquered Cyrenaica, and it became a Roman province 18 years later. Thereafter, it enjoyed peace until a Jewish revolt in 115 C.E. caused widespread destruction. Following reconstruction of the city, principally under the Emperor Hadrian, Cyrene again entered a period of prosperity. Though competition from Carthage and Alexandria reduced its trade, Cyrene, with its port of Apollonia (Marsā Sūsa), remained important until the earthquake of 365 C.E. destroyed much of the city.

[147] Aquileia is a Roman city founded in 181 B.C. in the southern part of the Friulian plain, close to the Lagoon of Grado. Thanks to its location, the town became an important center of commerce between the Danubian and the Mediterranean regions, crossed by the navigable Natissa River, which at that time flowed into the Adriatic; while a road network connected Aquileia to the Padanian plain and to Central Europe. Ships docked at its river port carrying building material (stones from Istria, marble from Greece and North Africa), while Istrian products like wine, olives, garum (a sauce made from pickled fish) and wool, were sold there.

> of the vessel could collect the freight agreed upon from the party who hired it, in accordance with the contract. The answer was that, from the facts stated, he could.[148]

When the public authority detained a vessel and prevented her owner from conveying his cargo, the owner was entitled to collect the transportation fees owed to him and revoke the leasing contract even if its terms stipulated otherwise.[149] Hypothetically, it stands to reason that a ship owner was not legally eligible to enter into an agreement with a shipper if the former had previously been notified by local authorities to outfit his vessel for public service. If he did so nonetheless, the shipper could have sued him in court for fraud and deception and make him bear the losses incurred.

Whereas the N. N. does not introduce laws regarding the detention of ships by local authorities, Islamic *responsa* and documentary evidence from the Cairo Geniza refer to real events and their legal repercussions. In a number of instances, commercial vessels—regardless of their ownership, origin, or type—were seized for state service in accordance with royal orders.[150] Due to the merchants' awareness of Islamic shipping laws, not many legal altercations arose between contracting parties. The parties recognized their rights and duties, so that if a shipper signed a contract to charter a particular vessel, her confiscation signified an involuntary abrogation of the agreement and the shipper's payment was refunded if the ship had not yet sailed. It is important to note that this rule was not applicable to a guaranteed personal service, where the carrier was committed to perform the contract.[151]

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[148] Scott, *op. cit.*, 5:100–101.

[149] *Ibid.*, 4:212, Digest XIV, 2, 10, 1.

[150] Khalilieh, *Islamic Maritime Law*, 143–148. The seizure of a merchant ship and conscription of seamen has been dealt with at length in reference to the legal status of ships in Islamic territorial waters. Significantly, vessels could not sail without the official permission of the port superintendent. TS 16.215*v*., ll. 2–5: "*yakhshā al-nāẓir al-ladhī fī Iskandariyya laʿalla al-nāẓir ʿinda safarī yuʿīqanī li-anna kull man huwa mina al-bilād yuʿīqahu mā yukhallīhi yusāfir ṣuḥbat al-Ifranj (. . .) ismī maktūb fī al-dīwān fī al-taʿrīf bil-safar.*" Similar regulations seemed to have prevailed in the Romano-Byzantine Mediterranean. Commercial ships could not depart from the port without obtaining the "*licentia navigandi*" of the port authorities. See Letsios, *Das Seegesetz der Rhodier*, 107–108.

[151] Ṭāher (ed.), *op. cit.*, 16–17, 19, 48–49; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:647; Wansharīsī, *Al-Miʿyār*, 8:299–300; Goitein, *Letters*, 236–237 [50]. TS 13 J 27, f. 9, ll. 11–13 ". . . *li-annī lammā kharajtu min ʿindaka wa-anā maʿwūl ilā al-Andalus famā [. . .] ilayya bi-tafrīgh al-markab.*" On a similar occasion another document (Bodl. MS Heb.

5. *Weather Conditions*

A legal edict from Codex Theodosianus forbade African shippers to load and ship government cargoes from November to April, during which period navigation was suspended.[152] Likewise, the Justinianic codices established comparable rules that preclude port authorities from permitting ships to sail unless the weather is favorable for navigation.[153] Sailing at other times was probably limited to military expeditions and urgent food shipments. Ships habitually set out from the eastern basin of the Mediterranean in the early spring and returned from the West for the Feast of Cross (*ʿĪd al-Ṣalīb*), celebrated on the 26th or 27th of September, while the return journey of eastward bound ships commenced between late July and early September.[154] As a rule, maritime custom prohibited seamen and shippers from sailing when the sea was rough and dangerous, bringing the shipping

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c 50, f. 19) refers to an Andalusian ship emptied and seized by the order of the *sulṭān*: "*al-markab al-Andalusī qad taʿaṭṭal bi-kitāb min ʿinda al-sulṭān wa-furigh jamīʿ mā fīhā*." Goitein, *Mediterranean Society*, 1:59. Another letter reports that a Genoese commercial fleet was imprisoned in Alexandria in about 1103. Goitein surmises that this action, might have been linked to Genoese exploits during the Crusaders' conquest of the Syro-Palestinian coastal cities. Bodl. MS Heb. b 3, f. 26, ll. 13–14, "*wa-qad qabaḍa al-sulṭān, aʿazza Allāh naṣrahu, ʿalā al-Ǧanawiyyīn wa-rubbamā qāmat nufūs al-Rūm li-ajali dhālik*"; Ben-Sasson, *op. cit.*, 22–24 [5], TS 10 J 10, f. 14, ll. 12–14; 325–330 [73], TS 13 J 20, f. 19, ll. 21–24, deals with the seizure of a Tunisian commercial vessel with her contents; TS 10 J 13, f. 21, (margin). Al-Kindī decrees that if Muslim authorities seized a ship for military expeditions and it was wrecked at sea, they had to pay her owner a nominal sum from the public treasury, but an amount based on daily leasing rates if the vessel was safely delivered to her owner. See Kindī, *Al-Muṣannaf*, 11:104.

[152] Pharr *et al.*, *Theodosian Code*, 399, Article CTh 13.9.3 enacts: "It is our pleasure surely, that since the month of November has been exempt from navigation, the month of April, since it is the nearest to summer, shall be employed for the acceptance of cargo. The necessity of such acceptance from the Kalends of April to the Kalends of October shall be preserved permanently; but navigation shall be extended to the day of the Ides of the aforesaid months." See also Scott, *op. cit.*, 15:165, CJ 11.1.8; Sirks, *Food for Rome*, 41–43, 156; Jean Rougé, "La navigation hivernale sous l'Empire romain," *Revue des Études Anciennes* 54 (1952), 323; *idem*, *Recherches sur l'organisation du commerce*, 32–33; R.H. Dolley, "Meteorology in the Byzantine Navy," *Mariner's Mirror* 37 (1951), 5–16; Semple, *Geography of the Mediterranean*, 579–591; Casson, *Ships and Seamanship*, 271, 297–299; Pryor, *Geography, Technology, and War*, 19–20, 87–90; Letsios, *Das Seegesetz der Rhodier*, 109–115; McCormick, *Origins of the European Economy*, 450–468.

[153] Scott, *op. cit.*, 15:165, CJ 11.1.8.

[154] Goitein, *Mediterranean Society*, 1:316–317, 481–482 notes 31–36; Gil, *op. cit.*, 4:414 [739], Bodl. MS Heb. a 3, f. 23, ll. 48–50; 4:530 [773], TS 8 J 18, f. 27, l. 15; Sirks, *Food for Rome*, 249; Jamie Morton, *The Role of the Physical Environment in Ancient Greek Seafaring* (Leiden: E.J. Brill, 2001), 255–265.

season to a standstill,[155] because loading, boarding, and sailing under these conditions was risky "and the Prophet has ordained against risk."[156] Even though the fixed loading and sailing timetable was part and parcel of an Islamic leasing contract,[157] the charterers had to wait a week or two until the weather conditions improved. If the weather remained unfavorable, the contractors could maintain and extend their agreement to the next navigation season if they opted not to breach it.[158] This suggests that winter cessation was not absolute, and that carriers did transport goods by water during the winter if economic and other incentives were sufficient.

6. *Human Perils*

Pirates, privateers, and enemy navies were as much a hazard to seafarers as bad weather. Pirate ships targeted commercial vessels in ports and along trunk routes. When lurking near ports of embarkation, they could harass commercial vessels and keep them from departing resulting in financial loss to either or both contractors. A mid-eleventh century Geniza letter vividly describes a pirate attack on a convoy of four commercial vessels anchored at Alexandria awaiting departure for Sicily the next morning. The attackers tried to set the vessels on fire, but the wind was against them and was not strong enough to kindle the firebrands, which were extinguished by the crew and passengers. The pirates succeeded only in plundering one ship, which they ultimately had to abandon, leaving her stranded on the rocks. The writer reports:

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[155] Ashburner, *op. cit.*, cxlii–cxliii; Rougé, "La navigation hivernale," 318; Casson, *Ships and Seamanship*, 270–271; Pryor, *Geography, Technology, and War*, 12–24; Goitein, *Mediterranean Society*, 1:316–318; Gil, *op. cit.*, 4:328–330 [704], Bodl. MS Heb. d 66, f. 4, despite the explicit prohibition against sailing under adverse conditions, we occasionally read of an adventurous captain, who took this type of risk upon himself. Such an incident occurred around 1057 when a commercial vessel sailed from Alexandria to Ifrīqiya, but shortly after departure the captain was forced to shelter in Abū Qīr.

[156] Ṭāher (ed.), *op. cit.*, 20; Qarāfī, *Al-Dhakhīra*, 10:378; Wansharīsī, *Al-Miʿyār*, 8:299. If the season of navigation has elapsed and traveling by sea is risky, the contract can be abrogated if some party calls for.

[157] Ṭāher (ed.), *op. cit.*, 14, 19; Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:447; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Ibn Salmūn, *Al-ʿIqd al-Munzzam*, 2:3–4; Ibn Mughīth, *Al-Muqniʿ fī ʿIlm al-Shurūṭ*, 243–244; Minhājī, *Jawāhir al-ʿUqūd*, 1:293–294.

[158] Ṭāher (ed.), *op. cit.*, 14–15, 20, 27, 48; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:647; Wansharīsī, *Al-Miʿyār*, 8:299–300; Idris, "Commerce maritime," 237.

> . . . Then there happened something, which I am not able to describe to you. It is not something which [often] occurs. The people felt safe as if they were in their own city. I have never seen nor even imagined what happened. I had rolled out my sleeping carpet and spread my bedding, as if I had been at home. My moneybag was under my head and I felt safe and calm—until hell broke loose. Ten galleys had penetrated the roadstead, each carrying 100 warriors, some of whom disembarked, while the others remained aboard. People said there were 200 galleys. This happened when the moon rose, but the sky was overcast. Land and sea became crammed. They threw firebrands into all the ships to burn them, but the fire did not catch. Praise be to God that the end was good! Thanks to God, the exalted! . . . They cut loose the ship of the Damascene and towed it behind them. But the wind was against them, so they turned it back, took out all they wished and left it on the rough ground. The two rudders of the ship of the employee of Ibn Shablūn were on her stern and without sailyards and sails. The rudders of the ships of the ʿAṭṭār and the Khammār were on land. All this was the cause that they could not take them. The firebrands thrown into them were not effective, for the wind there was not strong. Finally the people quenched the fire, working in shifts. But I am unable to describe what happened. *And Peace!* I threw the firebrands into the sea with my own hand.[159]

Had this incident occurred in Byzantine territory, lawyers and judges would certainly have referred to Article III:9 of the N. N., although Article III:15 also deals with the issue of piracy. If pirates or enemy vessels attacked merchant ships and captured their contents, what was taken away became subject to contribution with due reference to the laws of the general average.[160] Digest XIV, 2, 2, 3 corroborates this rule of law and requires the parties to incorporate properties seized by pirates and enemies within the category of the general average.[161] While Islamic law exempts the shippers from paying the freight charges, since the carrier has not left the port of origin, and permits the shipper to cancel the leasing contract; neither the vessel nor her cargo is subject to contribution if either is saved.[162]

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[159] Goitein, *Letters*, 322–323 [73], TS 8 J 24, f. 21; Ben-Sasson, *op. cit.*, 588–592; Gil, *op. cit.*, 4:194–197. Goitein and Ben Sasson assume that the letter in question was written to Nahray Ibn Nissīm of Fusṭāṭ by Ibrāhīm Ibn Faraḥ al-Iskandarānī around 1060, unlike Gil, who dates it to 1052 and attributes it to Jacob Ibn Salmān al-Ḥarīrī.

[160] Ashburner, *op. cit.*, 87; Dareste, "*Lex Rhodia*," 11; Justice, *General Treatise*, 91–93; Freshfield, *Manual of Later Roman Law*, 197; Letsios, *Das Seegesetz der Rhodier*, 259, 260.

[161] Scott, *op. cit.*, 4:209.

[162] Ṭāher (ed.), *op. cit.*, 19; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228.

Moreover, the government authorities had to compensate the ship owners and shippers if the incident occurred within their territorial jurisdiction, *i.e.* coastal waters, harbors, and rivers.[163] Note that the N. N. and A. S. do not include any articles demanding that ship owners/carriers provide protection against corsairs and hostile raids, although they warn against sailing in pirate-infested waters.

7. *Seaworthiness of Vessel*

To assure safe passage and avoid financial and human losses, Byzantine and Islamic laws enjoined shippers and ship owners/carriers to abide by safety regulations. As a rule, the ship could be loaded with cargo if there was room and the safety line (plimsoll) alongside the outer hull was visible.[164] Where shippers realized that a vessel had been overloaded, they had to comply with the principle "last in, first out," unless they were unfamiliar with that loading arrangement. Otherwise, the unloading would be proportionately divided among all merchants. Despite strict regulations against overloading, shippers and carriers occasionally overlooked the rules for the sake of profits. If a shipper violated the overloading regulations without the knowledge of the ship manager and his co-shippers, he alone would be held liable for the loss of and damage to the cargo, and he alone bore the responsibility for indemnifying the owners. If the guidelines against overloading were transgressed with the captain's knowledge, both parties bore the loss.[165]

II. *En Route*

Legal altercations between contracting parties in the loading berth appear to have been more readily solved than those that arose *en*

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[163] Khalilieh, *Islamic Maritime Law*, 138–148.

[164] Ibn Bassām, *Nihāyat al-Rutba*, 157; Ibn al-Ukhuwwa, *Maʿālim al-Qurbā*, 324; Ibn ʿAbdūn, *Seville Musulmane*, 63–64; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 235–236; Ibn Mājid, *Al-Fawāʾid*, 29, 242, 239–248; Mahrī, *Al-Minhāj al-Fākhir*, 105; Maqrīzī, *Al-Mawāʿiz wal-Iʿtibbār*, 1:463; Constable, *Trade and Traders*, 117; Pharr *et al.*, *Theodosian Code*, 399, Article CTh 13.5.27; Ashburner, *op. cit.*, clvi–clviii; Sirks, *Food for Rome*, 124, 135.

[165] Ashburner, *op. cit.*, 102–103, Article III:22; Dareste, "*Lex Rhodia*," 17; Justice, *General Treatise*, 100; Freshfield, *Manual of Later Roman Law*, 200; Letsios, *Das Seegesetz der Rhodier*, 262; Ṭāher (ed.), *op. cit.*, 50–51; Wansharīsī, *Al-Miʿyār*, 8:307; Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 8:33; Nawawī, *Rawḍat al-Ṭālibīn*, 7:190. He suggests a compromise, ruling that the violator must indemnify co-shippers half the value of their damaged cargo.

route. Several issues were involved: Did the shipper have to pay the shipping fees if his cargo did not reach its final destination due to manmade danger, climatic obstacles or technical problems? Did Byzantine legal codices and Islamic jurisprudential sources contain separate regulations relating to the high seas and coastal navigation? If the whole or a part of the consignment was spoiled by seawater or jettisoned, did the shipper have to pay the fees stipulated in the leasing agreement? Under what conditions did a ship owner/carrier either maintain his right to collect his fees or, conversely, forfeit payment for transporting the goods assigned to him? And what legal precedents having no parallels in the Digest or the N. N. were created by Islamic law?

1. *Calculation of Freight*

In contrast with Byzantine maritime practice, which required the shipper to pay half the freight charges prior to departure,[166] most jurists of the Islamic Mediterranean did not entitle the carriers to collect the freight costs unless the shipment was brought to its point of debarkation.[167] Contrary to overland transport, in which fees were commensurate with distance, the regulations governing carriage by sea—regardless of whether along the coast or across the high seas—required payment only when the cargo arrived at the port of destination.[168] Some jurists argued that collecting the shipping charges in accordance with the distance traversed was permissible in the case of cabotage (coastal navigation), but did not apply this principle to the high seas since "the distance covered is in the realm of the unknown," and thus immeasurable.[169] These rules could be implemented

[166] Articles III:20, III:24, III:27, and III:32.

[167] Despite explicit religious disapproval, a large number of Geniza business accounts conform to the N. N., showing that half freight was paid either upon signing the contract or prior to sailing.

[168] Ṭāher (ed.), *op. cit.*, 26; Saḥnūn, *Al-Mudawwana*, 4:493; Abū al-Qāsim ʿUbayd Allāh Ibn al-Ḥussein Ibn al-Jallāb, *Al-Tafrīʿ* (Beirut: Dār al-Gharb al-Islāmī, 1987), 2:188; Ibn Ḥazm, *Al-Muḥallā*, 7:26; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:642; Shihāb al-Dīn ʿAbd al-Raḥmān Ibn Muḥammad Ibn ʿAskar, *Ashal al-Madārik: Sharḥ Irshād al-Sālik fī Fiqh Imām al-Aʾimma Mālik* (Cairo, 1970), 2:334; Khushanī, *Uṣūl al-Futyā*, 148. A close reading of the N. N. shows that the jurists who instituted these laws did not distinguish between sailing the high seas and cabotage, but established uniform rules of navigation.

[169] Ṭāher (ed.), *op. cit.*, 21, 26–27; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:111; Qarāfī, *Al-Dhakhīra*, 5:485; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:525–526; Wansharīsī, *ʿUddat al-Burūq fī mā Jumiʿa mā fī al-Madhhab mina al-Jumūʿ wal-Furūq* (Beirut: Dār al-Gharb al-Islāmī, 1990), 554–555.

so long as factors beyond human control did not intervene. Unexpected hostile attacks, stormy weather or shipwreck required jurists to reconsider the laws governing coastal and high seas navigation and issue their judgments in conformity with actual developments.

Shipping fares could be affected by an "unexpected increase" of the shipment during a long overseas journey. For example, Muslim jurists clearly decreed that when a domestic animal is born on the vessel, her owner must pay an extra fee beyond that stipulated in the leasing agreement.[170] No comparable legal reference has been found in Romano-Byzantine judicial codices.

2. *Weather Conditions*

A leasing contract could be concluded at any time of the year, if the voyage itself was undertaken during the navigation season and under favorable weather conditions. Adverse weather and turbulent seas could force commercial vessels to take refuge and anchor in a safe port, change their course or head back to the embarkation port. In dealing with such incidents, some Muslim jurists distinguished between navigation on the high seas and cabotage. In the latter, where the wind blew the ship back to the port of origin, shippers had to pay the fee proportionate to the distance traversed. However, if the ship sailed across the open sea—from any Mediterranean island, say, to the Islamic coastal frontiers—but the wind drove the ship back to her embarkation point, the carrier was not entitled to the fees "for no benefit accrued to [the shippers]."[171]

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[170] Wansharīsī, *Al-Miʿyār*, 8:64. It is probably an indication that certain types of merchant ships were built for the transport of herds of animals, occupying all or a specific space on the vessel. As for a woman giving birth on a ship conveying female slaves or other women, the Digest absolves the infant's parents or the female slave's owner from the transportation fees "for the transportation was not more expensive, nor did the child consume anything, which was provided for the use of those navigating the vessel." See Scott, *op. cit.*, 5:86, Digest XIX, 2, 19, 7; Joseph A. Thomas, "Juridical Aspects of Carriage by Sea and and Warehousing in Roman Law," *Recueils de la société Jean Bodin pour l'histoire comparative des institutions* 32 (1972), 127. So far no identical Islamic ruling has been found, but this does not categorically signify that Muslim jurists did not discuss the issue. Presumably they adopted the Romano-Byzantine principle that exempts the shipper from paying when a baby is born on board a ship.

[171] Ṭāher (ed.), *op. cit.*, 22, 23; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:111, 112; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228; Qarāfī, *Al-Dhakhīra*, 5:485; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:597; Gil, *op. cit.*, 3:240 [372], TS 13 J 23, f. 18, ll. 16–18 describes a convoy of three ships headed back from Alexandria for the Maghrib in September in which two of them landed in Barnīk (Berenike/Benghazi), while the third anchored

Shippers stranded on the open sea who could not reach a populated location on the coast where they could sell their merchandise were exempt from transport costs since they derived no benefit from their journey. By contrast, shippers who disembarked at a coastal settlement and subsequently resumed sail had to pay a fee proportionate to the distance covered. Moreover, were they to arrive at a town and decide not to disembark, though they could have done so if they wished, the rule was that if they drew very close to shore to a point where they felt secure from the winds, they owed a fee proportional to the distance covered to that location. However, if they sailed far offshore, felt unsafe and so decided to head back, they were absolved from the fee.[172]

A great deal of early Muslim jurists argued that regulations pertaining to coastal navigation must be different from high seas shipping laws. Accordingly, in cabotage, shipping fees had to be calculated on the basis of the distance from the port of origin, taking into consideration the market prices of the shipments at the place where the vessel landed or came to a halt. Ibn Abī Firās cites in the A. S. a legal inquiry addressed to Abū Saʿīd Ibn Akhī Hishām (299–371/911–981) concerning lessee merchants who hired a ship to transport their cargoes and themselves from Sicily to Sūsa (Sousse).[173] The ship anchored in Tūnis and thereafter a violent gale and rough seas overwhelmed them and prevented them from continuing their voyage

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in Surt (Syrta, Sirte), was unloaded and subsequently foundered; 4:633–635 [815], TS 12.114, an Italian Jew sailed aboard ship carrying 400 passengers heading from Sicily to Alexandria, but was forced by stormy conditions to return to the embarkation point. For the English translation see Goitein, *Letters*, 39–42 [3].

[172] Ṭāher (ed.), *op. cit.*, 22; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:109–110; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:147–150; Khushanī, *Uṣūl al-Futyā*, 148; Qarāfī, *Al-Dhakhīra*, 5:485; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:650–651; Awzajandī, *Fatāwā Kāzī Khān*, 2:286. The shipper is exempted from paying the freight if he did not accompany his cargo.

[173] Sūsa is on the Gulf of Hammamet, and is one of the most important junctions for overland communications in Tunisia. The town was founded by the Phoenicians, and was called Hadrumetum. During the second century B.C. the city allied itself with the Romans against Carthage, later became part of the Roman Empire, and was named Hadrumentum. In the fifth century, the Vandals destroyed it, but settlement there continued, and it was named Hunerikopolis. The Byzantines took control in the sixth century and renamed the city Justinianopolis. The Arabs captured it in the seventh century and gave itr the name Sūsa. In the ninth century it became the main seaport for the Aghlabīd dynasty. From there, the Aghlabīd navy was launched against Sicily in 827 C.E. to conquer the island finally in 903. During the twelfth century the Normans occupied it for a short time.

for Sūsa. The issue to be resolved was what, if anything, did the shippers owe the ship owner/carrier if the merchandise they were transporting was in greater demand at the place of forced debarkation than at the intended destination? And, conversely, what were the lessee merchants' obligations to the ship owner/carrier if the market conditions at the place they were forced to anchor were less favorable than at the destination? He decrees:

> If they landed in a town located beyond Sūsa and its periphery, *i.e.*, they passed Sūsa, and decided to take advantage [of the opportunity to] stay in a place near there, and the market situation was approximately comparable to that of Sūsa, then the merchants must pay the freight agreed upon for Sūsa to the ship owner. If, however, they encountered a significantly more favorable commercial situation at this town, then the merchants would owe an increased fee to the ship owner, commensurate with the benefits they reaped at their new destination. Some of our fellow jurists hold that, in such cases, the merchants are at least to be charged a fee lower than for their share of the additional profit they reaped, or additional freight for the distance traveled beyond Sūsa; some of our fellow jurists absolve the merchants from paying the freight for the increased distance. If the market situation at their point of debarkation is manifestly less favorable than that of the market in Sūsa, they owe nothing at all to the ship owner, and the agreement between the parties becomes void. If they had headed for a location other than the point where they anchored—for instance if a ship leased for Sūsa but landed in Barqa, Sirte, or some other remote town—the merchants would then have to pay the ship owner in proportion to their profits. If the market prices are higher than or identical to those in Sūsa, the result will be the same as I have ruled earlier.[174]

3. *Human Perils*

Piracy was the most terrifying human threat to commercial vessels, and therefore was legally and morally condemned.[175] Pirates lurking in strategic positions along trunk routes could deter merchant ships

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[174] Ṭāher (ed.), *op. cit.*, 25–26; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ẓiyādāt*, 7:111–112; Burzulī, *Jāmiᶜ Masā'il al-Aḥkām*, 3:656; Wansharīsī, *Al-Miᶜyār*, 8:310; Noble, "Principles of Islamic Maritime law," 126–127.

[175] Letsios, *Das Seegesetz der Rhodier*, 117–118; Khalilieh, *Islamic Maritime Law*, 121, 125–127. Classical Islamic legal literature and historical accounts show that during wartime alien merchants traded in Muslim territories so long as they were equipped with a pledge of security (safe conduct/*amān*). Military ships of either side rarely attacked commercial vessel inasmuch as the ships did not carry military supplies. Hence Muslim traders engaged in commerce in war areas.

from reaching their destinations.[176] Seizing the cargo but freeing the ship, capturing the vessel, but releasing the cargo, or plundering the craft with her contents were the main actions by pirates who intercepted a ship. The Digest and the N. N. portray piracy as an illegal act, categorizing it with fire and shipwreck as one of the three cardinal adversities that could befall a seagoing vessel.[177] The Digest, distinguishing clearly between unavoidable and avoidable assaults, stipulates that when the attack was inevitable and the captain and his crew exercised their utmost effort to escape capture, the ship owner would be exempt from liability.[178] If the captured ship was ransomed from the pirates, all passengers had to pay contribution. The owners of the cargo had to bear the loss of any property pillaged by the pirates, however, and any shipper who ransomed his own goods could not claim contribution from other shippers on board.[179] Article III:9 of the N. N. upholds this same principle, but requires the passengers to share the losses equally, including the ransom. It provides that "if goods are carried away by enemies or by robbers or . . . together with the belongings of seamen, these too are to come into the calculation and contribute on the same principle."[180] In addition, the law holds the captain liable for financial losses if he sailed into pirate-infested waters despite the protests of apprehensive passengers. By the same token, shippers had to compensate the ship owner and bear the financial losses incurred to their shipments if they insisted on bringing the vessel into pirate-infested waters and pirates then seized craft and cargo.[181]

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[176] This might explain why merchantmen preferred to sail in convoy on the high seas. Pirates habitually stationed themselves near ports and coastal maritime lanes.

[177] Pharr *et al.*, *Theodosian Code*, 98, CTh 4.20.1; Scott, *op. cit.*, 3:136, Digest IV, 9, 3, 1; 4:185, Digest XIII, 6, 18; Article III:9 of the N. N., see further Ashburner, *op. cit.*, 87; Dareste, "*Lex Rhodia*," 11; Justice, *General Treatise*, 91–93; Freshfield, *Manual of Later Roman Law*, 197; Letsios, *Das Seegesetz der Rhodier*, 259; Emily Sohmer Tai, "Honor among Thieves: Piracy, Restitution, and Reprisal in Genoa, Venice, and the Crown of Catalonia-Aragon" (Ph.D. diss., Harvard University, 1996), 73. The Digest and the N. N. distinguish between maritime theft (piracy) and robbery on land. They instituted regulations not addressed here, since they are beyond the scope of the present study.

[178] Thomas, "Carriage by Sea," 139–140; Scott, *op. cit.*, 3:136, Digest IV, 9, 3, 1: ". . . where anything is lost through shipwreck, or by the violence of pirates, it is not improper to grant the [cargo] owner an exception."

[179] Scott, *op. cit.*, 4:209, Digest XIV, 2, 2, 3.

[180] Ashburner, *op. cit.*, 87.

[181] Article III:4 rules that if the captain steers his vessel into a place infested by pirates after being informed of the danger thereof by the passengers and thereupon

Neither the captain nor the passengers were allowed to divert the ship to a port infested with pirates.[182] If the vessel, while moore, was exposed to a raid by pirates, however, the captain could justifiably exercise his jurisdiction over the ship and her contents; the law authorized him to order the crew to sail immediately out to sea and save the property of the passengers and lessee merchants on board. Whoever disembarked and was abandoned by the captain might sue the latter, but his complaint would be of no avail if the captain acted in an emergency such an attack that demanded quick response. The only two situations in which the captain had to make restitution to the shipper were when he received a slave from him by way of deposit and the slave escaped or was abandoned,[183] or when he acted independently without the passengers' consent, when the time probably permitted consultation with them, in which case he was liable for losses.[184] Except for intentional misconduct on the part of the ship manager and his crew, the N. N. entitles the ship owner to retain the half of the freight charges paid in advance, even if the ship could not proceed to the destination due to pirates or hostile ships, and required shippers and passengers to pay a contribution if the ship was ransomed from pirates.

Although echoes of the Digest and the N. N. are evident in the *fatāwā* inquiries, Muslim jurists introduced new legal methods for adjudicating the consequences of piracy against merchantmen. If the vessel, after covering a part of the distance of a voyage, encountered extreme human peril, which caused the ship to divert her course and moor in a region where the shipper could not profit from the hire, he would be absolved from payment of shipping fees. If she anchored in a safely guarded place near her port of embarkation, the ship owner/carrier was entitled to collect the whole transportation

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they happen to be spoiled (robbed), the captain shall make good the loss. However, if the passengers bring the ship to dangerous place in spite of the captain's protests and any mischief happens, they shall sustain the damage. Ashburner, *op. cit.*, 83; Dareste, "*Lex Rhodia*," 7, 9; Justice, *General Treatise*, 88; Freshfield, *Manual of Later Roman Law*, 196; Letsios, *Das Seegesetz der Rhodier*, 258.

[182] McCormick, *Origins of the European Economy*, 428–429 describes how crews and passengers reached a consensus to divert the ship's course for fear of Arab ships lying in wait for Byzantine commercial vessels somewhere *en route*.

[183] Article III:15, Ashburner, *op. cit.*, 95–96; Dareste, "*Lex Rhodia*," 13; Justice, *General Treatise*, 96; Freshfield, *Manual of Later Roman Law*, 198–199; Letsios, *Das Seegesetz der Rhodier*, 260–261.

[184] McCormick, *Origins of the European Economy*, 428.

fee. If she sailed beyond the destination, the shipper would have to pay a comparable fee, and the difference for the increased distance.[185]

Some jurists shed further light upon this issue by finding that if the ship owner headed back to the port of origin at the request of the passengers, they must pay the rental fee. The only two circumstances in which the passengers were exempt from paying the costs of transport were: (a) when the ship owner voluntarily hastened back to the embarkation point against the passengers' will; and (b) when danger was imminent and unavoidable and either or both parties called for sailing back to the port of origin. These rules were effective so long as the shippers did not benefit from the journey. If, however, the ship manager could neither head for the final destination nor return to the homeport, but found shelter in a location where the shippers could sell their commodities, they had to compensate the ship owner/carrier commensurate with their profits. However, those who opted not to disembark and rather return with their cargoes to the port of origin had to pay rental fees commensurate with the distance covered in the outward-bound journey, and a comparable fee for the return trip. If the ship owner prevented the shippers from discharging their commodities at the first stopover, then they were exempt from the fees.[186] In addition, if the pirates captured the cargo but released the vessel, then the cargo owners had to pay the freight charges; they were exempt, however, if the pirates seized both the vessel and the cargo.[187] Furthermore, Muslim jurists held that if robbers plundered a ship sailing on inland waters, her manager had to bring his claims before the *sulṭān*, who was in charge of providing security and protection to vessels sailing on rivers within his jurisdiction. Otherwise, if the ship manager failed to bring the case to the local authorities and acted on his own initiative, he had to indemnify the cargo owner.[188]

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[185] Ṭāher (ed.), *op. cit.*, 20.

[186] *Ibid.*, 22–23; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:109–110; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:147–150; Kindī, *Al-Muṣannaf*, 21:155; Shammākhī, *Al-Īḍāḥ*, 3:580–581; Noble, "Principles of Islamic Maritime law," 124–125.

[187] Raṣṣāʿ, *Sharḥ Ḥudūd Ibn ʿArafa*, 2:525; Wansharīsī, *Al-Miʿyār*, 8:302.

[188] Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:63–64; Samuel M. Stern, "Three Petitions of the Fāṭimīd Period," *Oriens* 15 (1962), 172–178, TS Arabic Box 42, f. 158; Geoffrey Khan, *Arabic Legal and Administrative Documents in the Cambridge Genizah Collections* (Cambridge: Cambridge University Press, 1993), 330–331 [74], TS Arabic 42.158.

4. *Deviation*

Whenever possible, lessee merchants preferred to sail directly to their destinations, even if the debarkation port was on inland waters.[189] The shippers preferred to convey their goods from inland to Mediterranean ports and vice versa for reasons of economy and safety. Avoiding frequent stops in intermediary ports could save them time and prevent damage and/or looting of the cargo during transshipping.[190] Hence they chose to hire vessels capable of sailing on the high seas and on rivers, manned by skillful pilots with sufficient nautical knowledge of both bodies of water.[191]

A master of a vessel was not authorized to divert her course unless she was exposed to natural and human obstacles. The legal solutions proposed by Mālikī jurists conformed with the timing, distance covered, and security state of the region. Saḥnūn ruled that if the parties to the contract have been notified, after traversing a certain distance, that they cannot proceed to their destination, the shipper would still have to pay the transportation charges for that distance, and a comparable shipping fee for the return trip to the embarkation point if he opted not to continue his voyage. Otherwise, the shipper had to compensate the ship owner commensurate with the distance covered, and the leasing contract was nullified. These rules were applicable to cases where the vessel came to a halt at places under governmental jurisdiction. However, had the ship come to a standstill at a deserted location that lacked an official domain of a local authority, and the ship owner feared a loss of cargo and so leased another ship, the shipper was obligated to pay all of the shipping fees.[192]

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[189] Al-Asʿad Abū al-Makārim Ibn Mammātī, *Qawānīn al-Dawāwīn*, ed. by ʿAzīz Suryal ʿAṭiya (Cairo, 1943), 339–340; ʿAbbādy and Sālem, *Tārīkh al-Baḥriyya al-Islāmiyya fī Miṣr wal-Shām*, 145–147; Goitein, *Studies*, 304; Pryor, *Geography, Technology, and War*, 37–39, 54–55; Udovitch, "Time, the Sea and Society," 521–522; Ben-Sasson, *op. cit.*, 536 [108], TS 8 J 20, f. 2, l. 11; 540 [109], TS 13 J 16, f. 19, ll. 16–17.

[190] Ṭāher (ed.), *op. cit.*, 44; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:78; Wansharīsī, *Al-Miʿyār*, 8:300; Kindī, *Al-Muṣannaf*, 21:153; Shammākhī, *Al-Īḍāḥ*, 3:580–581; Khamīs Ibn Saʿīd al- Shiqṣī, *Manhaj al-Ṭālibīn wa-Balāgh al-Rāghibīn* (Masqaṭ, 1983), 12:295; Goitein, *Mediterranean Society*, 1:319; Khalilieh, *Islamic Maritime Law*, 24–25.

[191] Goitein, *Mediterranean Society*, 1:296; Udovitch, "Time, the Sea and Society," 521–522; Scott, *op. cit.*, 5:81, Digest XIX, 2, 13, 2. This charter warns shipmasters not to enter into a river without being accompanied by a pilot acquainted with the region. Having ignored this instruction, the lessor will be liable for the loss incurred to the lessee if the cargo is injured owing to the navigational error of the captain.

[192] Ṭāher (ed.), *op. cit.*, 21–22; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ẓiyādāt*,

One set of rulings by Muslim jurists required that for coastal navigation a shipper pay fees primarily commensurate with the distance traversed, if he reached a point close to his intended port of discharge.[193] Other jurists linked shipping fees to the market price where the ship moored or was disabled; the shipper therefore paid in proportion to the profits he derived from sales of his goods.[194] A third legal opinion required the shipper to pay only the difference of the distance. A fourth not only exempted shippers from paying the difference of distance if their sale was much less than the purchase price, but also permitted them to nullify the contract.[195] A fifth judicial position decreed that merchants pay only the fees established in the contract. And a final one ruled that if the merchants' proceeds were higher than at the original destination, then the ship owner could collect the fees as established in the contract plus an additional sum fixed by the shippers.[196] These *dicta* were pertinent when a merchant ship encountered either unfavorable weather or hostile attack, was technically disabled or totally wrecked, or could not reach her destination because of shallows in the estuaries or canals. The freight charges, as established in Islamic law, were subject to increase or decrease even if the chartered vessel did not anchor at the designated destination. Jurists took into account the distance covered from the port of origin and market prices at the port where the vessel moored. Significantly, none of the principles cited here is found in the Roman and Byzantine legal literature.

5. *Seaworthiness of Vessel*

Apart from administrative duties, the ship manager had to order the technical crew to inspect the hull, tackle, and nautical instruments frequently during the journey and to repair any defects.[197] If the captain and crew did not deal with any technical problem instantly and

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7:100–102, 109; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:63–65, 132; Qarāfī, *Al-Dhakhīra*, 5:485–486; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228; Khalilieh, *Islamic Maritime Law*, 142–143.

[193] Ṭāher (ed.), *op. cit.*, 26–27; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 8:498; Wansharīsī, *ʿUddat al-Burūq*, 554–555.

[194] Ṭāher (ed.), *op. cit.*, 24.

[195] *Ibid.*, 29; Ibn ʿAbd al-Barr, *Al-Kāfī*, 2:753.

[196] Wansharīsī, *Al-Miʿyār*, 8:310.

[197] A 1060s Geniza letter vividly describes how a merchant vessel carrying flax for Alexandria was disabled in Rosetta (Rashīd). A few days later, it was repaired and the shipper continued his journey aboard the same vessel for his intended destination. See Gil, *op. cit.*, 2:444 [151], Mosseri VII 155, ll. 10–18.

the ship was either damaged or wrecked, the carrier had to indemnify the shipper if all or part of his consignment was damaged. Conversely, the shipper had to indemnify the carrier if the vessel and cargo were lost due to the shipper's negligence. However, when shipwreck and cargo loss were not caused by captain, crew or shipper, what was saved became the subject of contribution.[198] With that, Islamic law presented several differing legal opinions regarding the circumstances triggering application of this rule. Some judicial authorities did not authorize the carrier to collect transportation costs—for a voyage on the open sea or by cabotage—unless he arrived safely at the destination and anchored at the docking terminal.[199] Another group of *fuqahā'*, advocated by Yaḥyā Ibn 'Umar, ruled that the sum payable should be disbursed in accordance with the distance covered until the point of shipwreck. If the vessel was wrecked near the embarkation port and part of the merchandise was jettisoned, no fee was payable to the ship owner. However, if the ship was disabled offshore and part of the merchandise was cast overboard, the fee was collectable in proportion to the distance covered, after deducting the shipping charges for the jetsam. Similarly, if the shipment was jettisoned at the designated port or in its vicinity and the leasing contract was concluded upon crossing the high seas, the ship owner could charge the fee proportionate to the distance covered, but no fee for the irredeemable cargo. Moreover, transportation charges for the recovered drenched goods had to be reduced in proportion to the damage done; if the value of goods was diminished by a certain amount, so were the freight charges.[200] If the goods remained intact, the shipper paid the fee in proportion to the distance covered since "he (shipper) benefited from the transport, saved time, and was brought closer to his ultimate destination."[201] And, if the winds drove the vessel back to the port of embarkation where-

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[198] N. N., Articles III:10 and III:41, see Ashburner, *op. cit.*, 91, 115; Justice, *General Treatise*, 93, 110; Freshfield, *Manual of Later Roman Law*, 199, 204; Dareste, "*Lex Rhodia*," 25; Letsios, *Das Seegesetz der Rhodier*, 259–260, 265.

[199] Ṭāher (ed.), *op. cit.*, 26, 27.

[200] *Ibid.*, 28, 29, 38–39; Saḥnūn, *Al-Mudawwana*, 4:494–495; Shāfi'ī, *Al-Umm*, 6:86; Sarakhsī, *Al-Mabsūṭ*, 16:10; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 15:447–448; 16:76–77; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 229; Wansharīsī, *Al-Mi'yār*, 8:332–335.

[201] Ṭāher (ed.), *op. cit.*, 29. The law entitles the lessor to cancel the contract for the rest of the voyage if his vessel is wrecked. The lessee cannot impose on the lessor to bring a substitute and convey the cargo unwillingly to the final destination if the contract was concluded upon a specific vessel.

upon it was wrecked, the shippers were not obliged to pay any fee because "they did not reap benefit from the voyage."[202]

6. *Cargo Damage*

Damage to cargo could occur due to irresistible force (*force majeure*) impossible to anticipate. For example, a second century C.E. pilot's receipt shows how a shipper added one and a half percent [1.5%] to the total consignments registered in the bill of lading, taking into consideration that either the volume of grain might shrink through loss of moisture, or be worth less due to sand in it or other impurities resulting from the shipment.[203] By the fifth century this customary practice was incorporated into the Codex Theodosianus, relieving the captain of liability if four percent [4%] of the cargo was lost or damaged during the journey by *force majeure*. It followed that if the loss exceeded 4%, then the ship owner could not escape liability.[204]

While the Digest and the N. N. do not refer to specific parallels, the practice of loading extra freight to the quantity registered in the bill of lading was prominent in the Mediterranean arena. An eighth century C.E. edict by Mālik explicitly refers to an incident where the carrier claimed, upon arrival at his destination, that a certain quantity of the grain or oil shipment was spoiled or water damaged. To authenticate or repudiate the carrier's testimony, Mālik ordered the contractants to consult with the experts in these matters. If they ruled that the level of shortfall was equivalent to a normal amount of leakage, then the carrier was relieved of liability after taking an oath, and no shipping fees were due him for the spoiled shipment. However, if there was only superficial damage from occasional spray from the sea, which does not commonly cause substantial harm to cargo, there should be no discount, and the carrier could collect the whole amount stipulated in the leasing agreement.[205] It is important to note that the percentage deducted from the total quantity registered in the bill of lading was not to exceed a single-digit ratio.

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[202] *Ibid.*, 28; Wansharīsī, *Al-Miʿyār*, 8:310–311.

[203] Edmund H. Kase, *Papyri in the Princeton University Collection* (Princeton: Princeton University Press, 1936), 2:17, AM 8930.

[204] Pharr *et al.*, *Theodosian Code*, 392, CTh 13.5.7; 396, CTh 13.5.38; 399, CTh 13.9.2, CTh 13.9.3.2; 400, CTh 13.9.5; Sirks, *Food for Rome*, 157–158.

[205] Ṭāher (ed.), *op. cit.*, 43; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:528; Wansharīsī, *Al-Miʿyār*, 8:308–309; Ḥaṭṭāb, *Mawāhib al-Ǧalīl*, 7:556–557.

Specifically, Mālik estimated the percentage of the superficial damage at three percent [3%] so that up to this ratio the amount payable should conform with the contract terms.[206] Nevertheless, if the impairment resulted from the seamen misconduct, then the ship owner was obliged to compensate the shippers.[207]

As noted, goods might be spoiled by water seepage affecting the shipments in the hold or by the frequent spraying of seawater onto cargo on the upper decks. Such an event occurred around 1050 to Jacob Ibn Salmān al-Ḥarīrī, who sailed from Alexandria to al-Lādhiqiyya (Laodicea).[208] In his letter to Nahray Ibn Nissīm, he vividly describes how water seeped into the hull and damaged part of the goods stored at the lowest levels. Crew and passengers alike pumped out seawater in shifts until they anchored securely in Tripoli on the Levantine coast. He reported:

> This is to inform that I arrived safely [in Tripoli] after a journey of eight days. . . . Water seeped into the ship and I worked the pumps from the very day we left Alexandria. Each man had to bail fifty buckets of water in a shift, each bucket being the size of half a Byzantine barrel. Our turn came two or three times during a day and a night. Abū al-Faraj Ibn Joseph, the Spaniard, also took his turn. Thank God, we arrived safely, but a great quantity of linen got wet, and the merchants quarreled with the owner of the boat until he remitted a part of the fare. My own linen became only slightly damaged by water, about fifty pounds of a total of two bales, a really negligible quantity.[209]

Had this incident been brought before a Byzantine court, the judges would most likely have referred to Articles III:38, III:40, and III:44 of the N. N., which commanded the parties to the maritime ven-

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[206] Ṭāher (ed.), *op. cit.*, 41; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ẓiyādāt*, 7:107; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:132–133.

[207] Ṭāher (ed.), *op. cit.*, 41; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ẓiyādāt*, 7:107–108; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 230–231; Awzajandī, *Fatāwā Kāzī-Khān*, 3:312; Qarāfi, *Al-Dhakhīra*, 5:486.

[208] Lādhiqiyya on the coast of Syria, was built in the second millennium B.C., in the Ugarit Kingdom; it was named after Laodicea, mother of Seleucos I, the kingdom's founder. Falling into the hands of all subsequent occupiers of Syria, it became part of the Roman and Byzantine empires, and after earthquakes in 494 and 555 was rebuilt by Justinian. Taken by the Arabs in 638, it reverted to the Byzantines and then to the Seljuk Turks in 1084. Under the Crusaders it was first incorporated into the principality of Antioch and called La Liche by the Latin prince Tancred, who considered it part of the Latin Bishopric; in 1188 Saladin captured it.

[209] Goitein, *Mediterranean Society*, 1:321, TS 12.241, ll. 1–11; Gil, *op. cit.*, 4:184–185 [660].

ture to make contribute for damage arising from wind and water.[210] By contrast, Muslim authorities have determined as follows: If the damage was incurred through natural forces rather than intentional dereliction of either contractor, the parties were to allocate the losses among themselves. The carrier was eligible to collect the freight fees commensurate with the distance traversed after appraising the remaining safe and injured goods; no shipping fee was payable for the spoiled cargo. If the whole shipment was lost, the carrier had no right to collect the fees.[211] If the ship sank and part of the shipment was salvaged, the carrier was entitled to collect transportation fees for the salvaged portion commensurate with the current value of the remaining goods and the distance covered,[212] provided the shipper paid the salvager's labor.[213] It is interesting to note that the N. N. and the A. S. both instructed the captain to supply his crew with buckets to pump out the bilge water. If they were delinquent and bilge water ruined the cargo, the carrier was held accountable for the loss.[214] The only difference between the Byzantine and Islamic practices lay in the reimbursement of the crew. Whereas the N. N. ordered shippers to pay a single-digit percentage of goods salvaged from a ship caught in a gale,[215] Islamic law dictated that they reward the crew only if they salvaged jettisoned goods.[216]

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[210] Letsios, *Das Seegesetz der Rhodier*, 204–205.

[211] Ṭāher (ed.), *op. cit.*, 29; Saḥnūn, *Al-Mudawwana*, 4:496–497; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 8:498; Ibn ʿAbd al-Barr, *Al-Kāfī*, 2:753; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:526; Aḥmad Ibn Ḥajar al-Haythamī, *Al-Fatāwā al-Kubrā al-Fiqhiyya* (Cairo, 1938), 3:146–147; Wansharīsī, *Al-Miʿyār*, 8:300–301, 308.

[212] Ṭāher (ed.), *op. cit.*, 29, 41, 43; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:111; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 8:498; 9:147–150; Nuwayrī, *Al-Ilmām*, 2:249–250.

[213] Ṭāher (ed.), *op. cit.*, 35: "The expenses incurred for salvaging the jetsam are paid by the cargo owner [*wa-ajr ikhrāj hādhā al-ladhī ukhrija ʿalā rabbihi*]."

[214] Articles III:38 and III:44; Ashburner, *op. cit.*, 112, 117; Dareste, "*Lex Rhodia*," 23, 25; Justice, *General Treatise*, 109, 111–112; Freshfield, *Manual of Later Roman Law*, 203, 204–205; Letsios, *Das Seegesetz der Rhodier*, 264, 265; Ṭāher (ed.), *op. cit.*, 43; Kindī, *Al-Muṣannaf*, 18:55.

[215] Article III:38. Based on Ashburner's translation, the seamen are entitled to collect 6% of the salvaged jetsam: "If it is from the gale that the cargo is injured, let the captain and the sailors together with the merchant bear the loss; and let the captain together with the ship and the sailors receive the six-hundredths of each thing saved." See Ashburner, *op. cit.*, 112. However, based on the translation of Justice, Dareste, and Freshfield the remuneration fee for salvaging the jettisoned cargo is fixed at one percent [1%] of the jetsam's value. Justice, *General Treatise*, 109; Dareste, "*Lex Rhodia*," 23; Freshfield, *Manual of Later Roman Law*, 203; Letsios, *Das Seegesetz der Rhodier*, 264.

[216] See note no. 214.

Although the Geniza occasionally refers to cases where the ship owner declined to remit part of the transportation charges to the shippers even if the whole shipment was cast overboard,[217] Islamic law ordered him to refund his shipper according to the rate of the jetsam, regardless of whether jettison took place in the port of origin, *en route*, or after reaching the destination.[218] If the goods were salvaged intact and conveyed to the port of discharge, the owner had to pay the entire fare as stipulated in the leasing agreement. However, if the salvaged jetsam lost a percentage of its actual value due to spoilage and the like, then the shipping fees were to be deducted proportionately to the current value of the damaged goods at the port of origin; the shipper had to pay fees in proportion to the decrease in the value of his goods.[219]

7. *Transshipping*

The tendency of shippers to convey their commodities aboard a definite vessel and avoid transshipping was indeed justifiable since the process could be costly, time-consuming and risky. Transshipping from one vessel to another was permissible, or even mandatory, when the hiring contract was signed for a guaranteed service (common carrier), according to which the ship owner/carrier was committed to transport the shipment by any means of transport. If the shipper chartered a specific vessel on condition that the carrier would supply a replacement in case of wreck, the contract was regarded as unlawful. If that particular vessel could not reach her destination owing to shallow water or technical problems, the carrier did not need to provide a substitute since the contract was legally void the moment the ship came to a standstill. If the carrier acted independently and nonetheless employed a substitute, he became liable for any subsequent damage to the consignment.[220] This principle is comparable to Article III:42 of the N. N., which entitled the captain to act as he saw fit if leakage prevented his vessel from reaching her

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[217] Goitein, "Jewish Trade," 380, TS 10 J 19, f. 19, ll. 22–23.

[218] Ṭāher (ed.), *op. cit.*, 35: "No fee is payable to the ship owner for jettisoned and seriously damaged commodities [*lā kirā' fī-mā rumiya fī al-baḥr wa-halak*]"; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 229.

[219] Ṭāher (ed.), *op. cit.*, 25, 35, 37.

[220] *Ibid.*, 16–17, 21, 42, 48–49; Abu Safieh, *Bardiyyāt Qurra Ibn Sharīk*, 258, Pap. 1353, l. 6.

destination. The captain could either collect the shipping fees as required by law, or transship the cargo aboard another vessel, or repair the damage and continue to the agreed trading-place where he could collect the whole freight.[221] The Digest explicitly states that a carrier cannot transship goods to another ship without the shipper's consent, or transfer the cargo at a time when he should not have done so, or load it in a vessel less seaworthy than his own. If he did so, the shipper had the right bring an action against him.[222]

III. *Destination*

Neither Byzantine nor Islamic leasing contracts and formulae stated a date of arrival at a destination since the duration of a voyage depended on the variability and changeability of winds, the amount of freight on board the vessel, her type and performance capability, the navigational ethics and professional expertise of the crew, directions of the tide and currents, and the distance and the course—whether the ship crossed the high seas or sailed in sight of the coast.[223] Documentary evidence nonetheless establishes that experienced travelers and seamen were able to compute the time voyages would take between various ports under favorable conditions, excluding unforeseen mechanical problems or human hazards.[224] However, altercations between the parties to the contract arose when a ship arrived at the destination, but for safety and security reasons could not enter the port; or, she was moored at the quayside but captain

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[221] Letsios, *Das Seegesetz der Rhodier*, 207–208, 265; Justice, *General Treatise*, 111; Dareste, "*Lex Rhodia*," 25; Freshfield, *Manual of Later Roman Law*, 204; Ashburner, *op. cit.*, 116.

[222] Scott, *op. cit.*, 5:81, Digest XIX, 2, 13, 2; Thomas, "Carriage by Sea," 129–130.

[223] Sulaymān Ibn Aḥmad al-Mahrī, *Al-ʿUmda al-Mahriyya fī oabṭ al-ʿUlūm al-Bahriyya* (Damscus: Maṭbaʿat al-Saʿāda, 1970), 18; Letsios, *Das Seegesetz der Rhodier*, 92–93.

[224] Casson, *Ships and Seamanship*, 281–296; Goitein, *Mediterranean Society*, 1:325–326; Pryor, *Geography, Technology, and War*, 5–6, 36; *idem*, "Types of Ships and their Performance Capabilities," 33–58; McCormick, *Origins of the European Economy*, 451–500. From the classical era of Rome to the late medieval period, the estimated speed of commercial ships ranged between 2.8–6.2 knots/hour with favorable winds, and 1.5–3.3 knots/hour under unfavorable winds. Muslim jurists ruled that if the ship owner failed to arrive at the destination on time and a portion got wet and depreciated in value, the loads must be appraised sound and in their current state. If they lost a third or a quarter of their value, the shipping charges are to be deducted by a third or a quarter. This ordinance proves that carriers and experienced shipper could estimate the duration of the maritime journey. See Ṭāher (ed.), *op. cit.*, 41; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ẓiyādāt*, 7:111, 112.

and crew were negligent; or, when shippers were occupied otherwise than with discharging their cargoes; or, a wind ruined part or all of the shipment.

Merchant ships arriving in late afternoon often had to anchor outside until the next day. Occasionally, an overnight delay would cause damage to cargo. If the port was open and a ship could still dock safely, but the shipmaster insisted on staying outside overnight, he was liable for any damage to the shipments. If the captain refrained from entering the port due to safety measures, and the passengers cooperated with him, then they had to pay all the freight fees. However, if the ship arrived at the destination after the harbor closed, the shippers were responsible for the damage.[225]

As a rule, the destined port had to be politically safe when the parties to the contract sign their agreement. However, a problem would arise when rival navies and pirates unpredictably blockaded the port of discharge, preventing commercial ships from entering. If a merchant vessel arrived at her destination but could not dock because of hostile warships, the ship manager and the shipper(s) could divert her course for a safer harbor near the original destination, anchoring there until the threat passed, provided the contract remained valid. A shipper was at liberty to discharge his consignment if he paid the rental fees to the carrier. However, the contract remained valid for those shippers who intended to unload in the original port once the blockade was lifted; they owed no additional charges to the carrier.[226]

Severe weather conditions, the most formidable threat to sailing vessels, could prevent the completion of the maritime venture even if the craft was securely tied to the dock at the port of debarkation. If the ship was caught in a storm when moored in the port of debarkation set forth in the leasing contract, the carrier was eligible to collect the entire shipping fee for the goods safely warehoused. However, he could not recover the freight from shippers for goods that still awaited unloading. But if the vessel suffered any damage together with the cargo still on board, both the shipper and carrier

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[225] Letsios, *Das Seegesetz der Rhodier*, 163–164; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:656–657; Wansharīsī, *Al-Miʿyār*, 8:306.

[226] Ṭāher (ed.), *op. cit.*, 20; Raṣṣāʿ, *Sharḥ Ḥudūd Ibn ʿArafa*, 2:526; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:526; Wansharīsī, *Al-Miʿyār*, 8:302–305.

had to come into contribution.[227] Muslim jurists posited a similar principle and ruled that if a vessel reached her destination and a disaster befell her upon arrival so that it was impossible to discharge the cargo, no payment was due the ship owner; this case was treated as equivalent to a vessel not reaching her destination. Mālik and Ibn al-Qāsim endorsed this ruling, but added that where anchorage was accomplished and the shippers were occupied with other tasks, when they could have been unloading their cargo, they would have to pay the freight in full. Had the vessel moored in the anchorage and the shippers immediately begun to discharge the cargo and load it into warehouses before a calamity befell them, those whose shipments were saved had to pay the freightage in full, while those who lost part or all of the shipment were absolved from paying the fee for the ruined goods; this case paralleled that of a merchantman that could not reach the destination. No fee was due the ship owner, unless he secured his vessel to the quayside and fulfilled his contractual obligations and no obstacles beyond human control intervened. Moreover, the sum payable for cargo spoiled by wreckage or jettison was deducted proportionately to the depreciation of goods.[228]

As the ship arrived at her destination, the captain customarily gave up his command to a harbor pilot, who navigated the craft to the allocated terminal to avoid collision with other ships in the mooring process.[229] At the wharf, the seamen had to secure the ship to the quay at a distance from neighboring vessels that would avoid possible damage from the impact of waves causing collision. Nonetheless, such a misfortune might still befall a ship while anchoring and the captain would order the crew to jettison part of the cargo for fear of foundering. In such a case, the vessel and the value

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[227] Article III:33; Ashburner, *op. cit.*, 109; Justice, *General Treatise*, 105; Freshfield, *Manual of Later Roman Law*, 202; Dareste, "*Lex Rhodia*," 21; Letsios, *Das Seegesetz der Rhodier*, 176, 263.

[228] Ṭāher (ed.), *op. cit.*, 27–28; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:102; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228–229; Qarāfī, *Al-Dhakhīra*, 5:485–486; Burzulī, *Ǧāmiˁ Masāʾil al-Aḥkām*, 3:656–657; Wansharīsī, *Al-Miʿyār*, 8:306. The lessor cannot claim the freight for whatever cargo perishes at anchorage owing to wreckage or jettison before mooring at the docking berth. Moreover, these regulations also applied in case of pirate and enemy attacks on the port of destination.

[229] Gerald R. Tibbetts, *Arab Navigation in the Indian Ocean before the Coming of the Portuguese* (London: The Royal Asiatic Society of Great Britain and Ireland, 1971), 60–61.

of her remaining safe goods were averaged.[230] The captain and crew were held solely liable for the damage to the ship and her contents if they were found to have ignored basic landing safety regulations, and they had to compensate the injured party for their ineptitude.[231]

The carrier's liability for the safety of cargo began the moment the shipment was transferred to him at the port of origin and expired when the ship was secured to the landing berth at her destination. Neither the N. N. nor the A. S. required the ship owner/carrier to discharge the cargo unless the contract terms or local custom so stipulated.[232] Otherwise, the shipper bore unloading expenses.[233]

Cancellation of Contract

When the contracting parties signed the agreement voluntarily, each was of course expected to fulfill its contractual promises, although either might fail to do so. For example, the carrier might intentionally or unintentionally fail to ready his vessel at the port of origin, or the shipper to bring his cargo to the loading berth. Either party might perform untimely, poorly or at the wrong place. In addition, the carrier might not have been able to comply with the contract provisions because of a technical malfunction or factors beyond human control. All these cases could render the contract impracticable.

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[230] Ṭāher (ed.), *op. cit.*, 36; Qarāfī, *Al-Dhakhīra*, 5:487; *idem*, *Al-Furūq*, 4:10; Wansharīsī, *Al-Miʿyār*, 8:306; Nuwayrī, *Al-Ilmām*, 2:244; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 235: The vessel is subject to contribution if her owner is proved to have taken risks and sailed under adverse sea conditions. *Ibid.*, 236–237, reads: "The ship owner is entitled to ask them [the merchants]: jettison your shipments to lighten my vessel."

[231] Article III:26, Ashburner, *op. cit.*, 105; Letsios, *Das Seegesetz der Rhodier*, 206, 262; Justice, *General Treatise*, 102; Dareste, "*Lex Rhodia*," 19; Freshfield, *Manual of Later Roman Law*, 201; Ibn Mājid, *Al-Fawāʾid*, 364; Khalilieh, *Islamic Maritime Law*, 68–69.

[232] Ashburner, *op. cit.*, cxcvii; Khalilieh, *Islamic Maritime Law*, 81–82; Wansharīsī, *Al-Miʿyār*, 8:301. The Digest established a similar practice and required the lessor to provide a protected and locked building in which to deposit the cargo if the contracting parties so stipulated. Scott, *op. cit.*, 3:137, Digest IV, 9, 5 reads: "The owner of a ship receives pay . . . but not for the safe-keeping of property; the ship owner receives it for the transportation of passengers . . . [he is] also liable to an action of hiring for safe custody." See Thomas, "Carriage by Sea," 147–149. About the legal signicance of *custodia* in classical Roman law, consult G.C,J,J. Van Den Bergh, "*Custodiam Praestare: Custodia*-Liability or Liability for Failing *Custodia?*," *Revue d'histoire du droit* 43 (1975), 59–72.

[233] Gil, *op. cit.*, 3:137 [346], Mosseri IV 79*v*., l. 5.

Rhodian lawyers required both shipper and carrier to include nonfulfillment penalties within their contract of carriage. If they failed to set them out in the written contract, both parties would have to comply with the judicial penalties instituted in the codified maritime laws.[234] Neither shipper nor carrier was entitled to abrogate the contract without compelling reasons. If the shipper voluntarily wished to withdraw and abandon the voyage, he had to pay for the whole freightage to the carrier.[235] Comparable penalties were enforced against the ship owner if he reneged on the contract terms. Rhodian legists made three references to the size of the penalty. Article III:20 required the carrier to pay "the half-freight to the merchant" if the former breached the contract.[236] Articles III:19 and III:24, on the other hand, required the carrier to forfeit double the amount set forth in the leasing agreement. Specially, if the carrier refused to transport the cargo agreed upon in the leasing transaction and committed a breach, he forfeited twice the amount stipulated in the agreement.[237] Obviously, some regulations were mutually incompatible. Whereas III:20 ordered the carrier to repay the advance fee only, III:19 and III:24 ordered him to refund the shipper the half-freight paid in advance as well as an equivalent amount stipulated in their contract. Rhodian lawyers may have distinguished between early and last minute abrogation, which could explain these legal inconsistencies. So long as the contract was abrogated in the early stages, the ship owner had to refund the hirer the half-freight. Reimbursement

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[234] Article III:20; Ashburner, *op. cit.*, 99; Justice, *General Treatise*, 99; Letsios, *Das Seegesetz der Rhodier*, 162, 261.

[235] Ashburner, *op. cit.*, 98, Article III:19: "If a man hires a ship and gives earnest-money and afterwards says 'I have no need of it,' he loses his earnest money." Article III:20, rules: "If the merchant wishes to take out the cargo, he will give the whole freight to the captain." An identical provision is restated in Articles III:23 and III:25 of the same treatise. See Ashburner, *op. cit.*, 103; Justice, *General Treatise*, 100, 101; Dareste, "*Lex Rhodia*," 17, 19; Freshfield, *Manual of Later Roman Law*, 200, 201; Letsios, *Das Seegesetz der Rhodier*, 162, 262.

[236] Ashburner, *op. cit.*, 98; Letsios, *Das Seegesetz der Rhodier*, 162, 203–204.

[237] Letsios, *Das Seegesetz der Rhodier*, 201; Freshfield, *Manual of Later Roman Law*, 200–201; Ashburner, *op. cit.*, 98, Article III:19: "If the captain acts wrongfully, let him give back to the merchant double the earnest-money." On p. 103, Article III:24: "Where there is a contract in writing and the captain commits a breach, let him return the half freight and as much as again." In determining the penalty paid by the ship owner, Byzantine lawyers apparently took into consideration the consequences the merchant might have incurred by losing the season of navigation and commerce. Hence the amount of compensation necessarily consisted of a portion of the profit the lessee might reap from his overseas transaction.

consisted of the advance payment and an additional comparable penalty fixed in the contract, if the ship owner breached it shortly before departure or after he set sail. Interestingly, the law appears to apply either penalty fee to cases when the navigation season was about to end with the approach of winter, or when the ship owner/carrier concluded a better deal with other shippers.

The carrier was bound to honor and implement the contract terms irrespective of *force majeure*, the intervention of sovereign authorities or technical malfunction of the vessel. However, if the vessel was disabled or wrecked due to rough seas during the loading process, the shipper had to reimburse her owner half of the freight, while the craft was subject to contribution,[238] to the extent that the wreck did not occur due to the malice or negligence of the seamen or captain.[239] The Rhodian lawyers went on to discuss difficulties that could occur during loading. Article III:42, dealing explicitly with this question, relieved the ship owner of responsibility for not complying with the contract's terms due to technical impediments. It decrees:

> If a ship springs a leak while it is carrying goods and the goods are taken out, let it lie with the captain, whether he wishes to carry the goods in the ship to the trading-place agreed upon, if the ship is repaired. If the ship is not repaired, but the captain takes another ship to the trading-place agreed upon, let him give the whole freight.[240]

The noted Article does not deal categorically with a clear-cut breach of the ship owner's obligation, but gives the carrier two alternatives for completing his task. He could repair the ship and convey the cargo to its prescribed market, if the repair did not last long, or he could transship the cargo to another vessel if he paid the freight charges of the substitute boat, regardless of the expenses incurred in transshipping. In all events, as the Digest suggests, the carrier was still liable for the consequences of transshipping if the substitute vessel was lost with her cargo, or if the shipments were partially or totally damaged as a result.[241] This made the ship owner account-

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[238] N. N., Articles III:28, III:29, and III:32.

[239] Article III:27, Ashburner, *op. cit.*, 105; Justice, *General Treatise*, 102; Dareste, "*Lex Rhodia*," 19; Freshfield, *Manual of Later Roman Law*, 201; Letsios, *Das Seegesetz der Rhodier*, 262–263.

[240] Ashburner, *op. cit.*, 116.

[241] Scott, *op. cit.*, 4:212, Digest XIV, 2, 10, 1; 5:81 Digest XIX, 2, 13, 1; Van Den Bergh, "*Custodiam Praestare*," 69.

able for conveying the goods to the ultimate destination under all circumstances, and in the same state he received them in the port of origin, despite the technical malfunction of the original vessel.

In dealing with the alleged abrogation of a contract, Islamic judicial authorities considered whether the lease was for the hire of a guaranteed service (common carrier), or a specific ship. In the former case, the carrier was committed to transport the cargo to its ultimate destination by all means of transportation, including pack animals if the intended harbor lay overland, and the freightage was always payable upon arrival at the destination, regardless of weather conditions, technical problems or hostile attacks that might have interfered with the course of the voyage.[242] In this sense Islamic law corresponded with the Byzantine practice.

The rules regarding contracts that specify a particular vessel are different. In contrast with Article III:42 of the N. N., the A. S. invalidates the charter contract the moment the ship is wrecked. Neither shipper nor carrier is allowed to incorporate a provision guaranteeing to provide a substitute if the designated vessel is sunk. Even if they did so, such a contract would be null and void.[243] Extensive wreck or total damage that rendered the ship unnavigable terminated the contract provided that damage could not be repaired, in which case the sum payable was ordinarily determined according to the distance or time involved, if it was endorsed within a fixed period. To deal with this issue from a technical perspective, Muslim jurists relied not only on the testimony of the captain and crew, but ordered at least two arbitrators versed in nautical technology and shipbuilding

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[242] Ṭāher (ed.), *op. cit.*, 16–17, 19; Saḥnūn, *Al-Mudawwana*, 4:409–410, 440; Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:447; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:38, 43; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 8:81–82, 498; Ibn Juzayy, *Al-Qawānīn al-Fiqhiyya*, 281; Ibn Mughīth, *Al-Muqniʿ fī ʿIlm al-Shurūṭ*, 442–444; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Marrākishī, *Wathāʾiq al-Murābiṭīn wal-Muwaḥḥidīn*, 470–472; Shammākhī, *Al-Īḍāḥ*, 3:575; Kindī, *Al-Muṣannaf*, 21:155; Qarāfī, *Al-Dhakhīra*, 5:474–475; Ibn ʿĀṣim, *Tuhfat Ibn ʿĀṣim*, 197; Wansharīsī, *Al-Miʿyār*, 8:300–301; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:550–551; ʿAbd al-ʿAzīz Ibn al-Barrāj, *Al-Muhadhdhab* (Qumm: Muʾassasat al-Nashr al-Islāmī, 1989), 1:483; Khalilieh, *Islamic Maritime Law*., 61–64.

[243] Ṭāher (ed.), *op. cit.*, 16; Saḥnūn, *Al-Mudawwana*, 4:440, 496–497; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:38; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:81–82; Rafīʿ, *Muʿīn al-Ḥukkām*, 2:526; Ibn al-Barrāj, *Al-Muhadhdhab*, 1:483; Ibn Juzayy, *Al-Qawānīn al-Fiqhiyya*, 281; Shammākhī, *Al-Īḍāḥ*, 3:575; Ibn ʿAbd al-Barr, *Al-Kāfī*, 2:753; Jazīrī, *Al-Maqṣad al-Maqṣad*, 225; Qarāfī, *Al-Dhakhīra*, 5:474–475; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:550–551; Kindī, *Al-Muṣannaf*, 21:155.

to evaluate the damage and determine whether the ship was navigable or not.[244]

Manmade hazards and natural perils constituted grounds for revoking the contract by either party at any stage: before the ship sailed or during the voyage. As in the Codex Theodosianus, commercial ships were prohibited from sailing when navigation was suspended and the sea lanes closed, and when enemy or pirate ships lurked near ports. The law ordered the parties to wait for the weather to improve or for the threats to disappear. Faced with an indefinite waiting period, however, the contractual parties could either postpone their departure for the next sailing season, or abrogate their agreement.[245] Within this category, one could argue as to whether the detention of commercial vessels by local authorities justified breaching the leasing agreement. The only difference between Islamic law and the Digest in this regard related to the sum payable. While Islamic legal authorities did not allow the ship owner/carrier to collect the freight until the ship sailed,[246] Romano-Byzantine jurists entitled him to charge the shipper "in accordance with the contract".[247]

Invalidation of the contract in Islamic law was congruent with the Prophetic tradition that "there shall be no harming of one man by another."[248] With the exception of the impediment factors mentioned above, the law forbade either party to the contract to breach their covenant unilaterally, especially if such a cancellation would severely injure either of them. Like their Byzantine counterparts, Muslim jurists disapproved of rescission of the leasing contract during the crucial time when the ship was about to sail. If the merchant, without a compelling reason, refused to load the shipment, he had to pay the fees involved. If the ship owner delayed sailing until after the convoy of vessels headed back and the sea lanes were closed,

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[244] Ṭāher (ed.), *op. cit.*, 24; Kindī, *Al-Muṣannaf*, 21:153–154; Shammākhī, *Al-Īḍāḥ*, 3:580–581; Shiqṣī, *Manhaj al-Ṭālibīn*, 12:295–296. Identical principles can be found in fourth and fifth century Romano-Byzantine laws. See CTh 13.9.3, CTh 13.9.6, CJ 11.5.1, and CJ 11.5.3.

[245] Ṭāher (ed.), *op. cit.*, 14, 19–21; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228; Wansharīsī, *Al-Miʿyār*, 8:299–300; Qarāfī, *Al-Dhakhīra*, 10:378; Kindī, *Al-Muṣannaf*, 21:153–154.

[246] Ṭāher (ed.), *op. cit.*, 19.

[247] Scott, *op. cit.*, 5:100–101, Digest XIX, 2, 61, 1.

[248] *"Lā ḍarar wa-lā ḍirār*—no licit good faith contract should lead to harm either to oneself or damage to others." See Ṭāher (ed.), *op. cit.*, 14; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:136.

the merchant was exempt from paying the transportation fee and was allowed to unload his shipment.[249] However, if the contract provided for the transporting of a specific shipment to a definite destination, and that shipment was stolen before or after being loaded,[250] the merchant had to pay all the freight charges.[251] While the Mālikī practice held the merchant responsible for the entire fee, the Ḥanafite stipulated a partial remuneration. The differing legal positions between the two Islamic law schools are reflected in their *fatāwā* collections. When Kāzī-Khān was asked about a man who chartered a ship to transport commodities, but when the ship owner reached the port of embarkation he discovered that they were not there, he declared: "The lessee must indemnify the ship owner an incomplete *kirā'* since the ship sailed empty to the port of embarkation."[252] The partial compensation incumbent on the shipper only applied to the voyage out from the original port. Therefore, one may assume that the shipper had to pay the whole freight on the return voyage, as if the ship transported the consignment.

Some jurists took the position that damage to the goods was a sufficient reason to breach the contract. Those who did suggest nullifying the contract regardless of the quantity of damaged cargo. Others, adopting an opposing view, assumed that the contract remained valid, whereas a third group advocated a compromise, stating that "unless the damage resulted from an act of God, the leasing contract cannot be repudiated and the shipper must pay the cost of the freight in proportion to the distance covered."[253]

Summary

For over a millennium, the principles of the contract of affreightment, especially those that dealt with the charter of a specific vessel, remained

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[249] Kindī, *Al-Muṣannaf*, 21:154–155.

[250] A distinction must be made between cargo stolen by the crew or another party. In the former situation the responsibility is laid upon the employer, *i.e.*, ship manager or owner for he is solely accountable for its safety if the merchant does not accompany his shipment.

[251] Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:82–83; Ibn ʿĀṣim, *Tuhfat Ibn ʿĀṣim*, 580–581.

[252] Awzajandī, *Fatāwā Kāzī-Khān*, 2:287; Ibn Nujaym al-Miṣrī, *Rasā'il Ibn Nujaym* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1980), 152–153.

[253] Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:82–83.

unchanged. The contracting parties had to specify the vessel's type, name, rigging, and equipment, identify the senior officers and crew, and fix the course of the voyage, including ports of origin and destination. Beside making sure that the chartered vessel was seaworthy, both contracting parties had to fix the freightage and indicate the payment arrangements, whether in advance, by installments, or upon delivery of the goods at the journey's end.

Byzantine and Islamic laws shared other principles as well. First, customary law in the Mediterranean required delivery of the consignment to the quayside, at the time fixed in the contract. Second, a shipper detaining a vessel had to pay additional expenses commensurate with the rate indicated in the agreement. Similarly, if a ship owner/carrier neither furnished a seaworthy vessel, nor provided the vessel specified in the contract at the prescribed port, he was fined. However, when a ship could not depart due to hostile attacks, inclement weather or detention by local authorities, the shipper had to pay contribution. Finally, a unilateral abrogation by either party required the violator to remunerate the other party. In short, save for minor differences, the rules governing altercations that arose in the port of embarkation were largely similar in Byzantine and Islamic maritime practices.

Differences between the Digest and the N. N., on the one hand, and the A. S. and other Islamic judicial sources, on the other, are greater with reference to problems that emerged *en route*. For the first time in the history of maritime law, Muslim legists promulgated laws and customs linking freight charges with: (a) the distance covered and (b) the market prices the cargo would fetch if the ship anchored at a port other than the destination. The new legal precedents pertained for the most part to merchantmen sailing by cabotage when subjected to extreme human perils, tempestuous weather, or the result of technical malfunction. By all accounts, the payment of wages to seamen was not affected, whether the ship owner profited from the trading voyage or not. Moreover, Muslim law doctors instituted new regulations pertaining to the lease of a common carrier, or what they call "a guaranteed personal service." This development, scarcely addressed in the Digest and not mentioned at all in the N. N., appears to be another major Islamic contribution to international sea law. This sort of contract could not have developed

without the expansion of Islamic maritime trade in the Mediterranean from the eighth century onwards. To appreciate such a contribution fully would require a new analytical study comparing the laws on the hire of a common carrier following Islamic and European maritime practices in the eleventh century Mediterranean.

CHAPTER FOUR

JETTISON, GENERAL AVERAGE, AND CONTRIBUTION

General

The etymological origin of the term "general average" provides an interesting introduction to the principles of the law on jettison and contribution. The English word "average" derives from the Latin *avaria*,[1] which in turn came from the Arabic *ʿawār* or *ʿawāriya*, signifying damaged merchandise or damaged vessel.[2] The Latin word is unlikely to have existed prior to the middle of the tenth century, when the Commercial Revolution in the Mediterranean world began. By the end of the immediately preceding centuries, when Muslims began to dominate the trunk routes and strategic positions in the Mediterranean, hundreds of Arabic nautical and legal terms were Latinized/Romanized.[3] The word "general" is self-explanatory, meaning here simply "common." Thus "general average" signifies the sacrifice made, or expenditure incurred, for the common safety and common good, in order to save ship, cargo, and humans imperiled in a joint

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[1] Salvatore Battaglia, *Grande Dizionario della Lingua Italiana* (Napoli, 1961), 1:871, he writes: "*Dall' Ar. ʿawārīya, 'merce avariata', deriv. da ʿawār, 'danno deteriorameto*"; Emili Vallès, *Pal-Las Diccionari Català* (Barcelona, 1962), 60: "*Avaria; Dany sofert per les mercaderies en el transport.*" The Spanish equivalent is *averî*: Aldo Duro, *Vocabolario della Lingua Italiana* (Roma: Instituto della Enciclopedia Italiana, 1986), 1:359–360, among the other meanings the editor writes: (a) "*Qualunque danno sofferto da una nave.*" (b) "*Nella tecnica dei trasporti, danno o deterioramento sofferto da una merce in viaggio . . .*"; W.H. Maigne D'Arnis, *Lexicon Manuale Ad Scriptores Mediae Et Infimae Latinitatis* (Paris, 1866), 251: "*Avaria: indemnité payée aux négociants dont les merchandises ont péri en mer par suite de la nécessité où on s'est trouvé d'en alléger le navire, par ceux dont les ballots, n'ayant pas eu le même sort sont arrivés à bon port.*" "*Avaria grossa: Lancement à la mer du grèement et du chargement du navire pour l'alleger dans un cas de danger*"; L. Marcel Devic, *Dictionaire étymologique des mots français d'origine orientale* (Paris: Imprimerie nationale, 1876), 50–51.

[2] Muḥammad Murtaḍā al-Ḥusaynī al-Zabīdī, *Tāj al-ʿArūs*, ed. by Ḥussein Naṣṣār (Kuwait, 1974), 13:157–158; Edward W. Lane, *Arabic-English Lexicon* (Beirut: Libraire du Liban, 1980), 5:2195, "*ʿawār* or *ʿuwār*: a defect or an imperfection in an article of merchandise and in a garment, or piece of cloth, and in a slave, and in a beast, and so in the like, and in a house or tent"; Noble, "Principles of Islamic Maritime Law," 220.

[3] Devic, *Dictionare étymologique*; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 20.

maritime venture.[4] Where deemed applicable, the general average required pro rata contributions[5] by all concerned parties.

Once a vessel encountered tempest or accident and was in impending peril of foundering, jettisoning her cargo, her equipment and even human beings was necessary to make her lighter and more buoyant, and this necessity was reason jettisoning became lawful.[6] In regions of war and piracy, jettisoning all or part of the cargo might make a vessel a less tempting target for enemy warships and pirates, since in both situations a lighter, more maneuverable ship stood a better chance of escape than a heavily laden one. Even though these circumstances sound plausible as reasons for jettison, numerous questions remain to be answered. First and foremost, what sort or degree of peril sufficed to produce a general average situation? To what extent was the shipmaster's judgment respected after the event, even if he might have wrongly estimated the peril? When could a sacrifice be called voluntary? How was the right to receive contribution affected if the peril might have been the fault of a party to the maritime venture? How precisely were the interests benefited by the sacrifice, and hence subject to contribution, defined, and given a money value?

Rules of Jettison

Although the Digest does not deal directly with the act of jettison, it suggests that someone on board, other than the actual owner, should jettison the cargo for the sake of the common good.[7] However, a consultation among the captain, crew, and shippers prior to the

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[4] Thomas J. Schoenbaum, *Admiralty and Maritime Law* (St. Paul, MN: West Publishing, 1994), 811.

[5] The legal Arabic term of classical Islam to signify contribution of losses is *muqāṣṣa* or *muḥāṣṣa*. See Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:642; David Santillana, *Instituzioni di diritto musulmano malichita con riguardo anche al sistema sciafiita* (Roma: Instituto per l'Oriente, 1938), 2:192; Qāḍī Ꜥiyāḍ, *Madhāhib al-Ḥukkām*, 235; Noble, "Principles of Islamic Maritime Law," 239.

[6] Casting cargo overboard was a Mediterranean practice from the dawn of civilization through the high Middle Ages. The Bible addresses the subject, notably in Jonah 1:5 as does the *Qur'ān* 37:139–145.

[7] Scott, *Civil Law*, 5:111, Digest XIX, 5, 14: "Where anyone throws merchandise belonging to another into the sea for the purpose of saving his own, he will not be liable to any action. If, however, he does this without any reason, he will be liable to an action *in factum*; and he should do so with malicious intent, he will be liable to an action on that ground"; Letsios, *Das Seegesetz der Rhodier*, 168.

act of jettison was necessary if the peril was not immediate and time allowed. The first passage of Article III:9 of the N. N. reads: "If the captain is deliberating about jettison, let him ask the passengers who have goods on board; and let them take a vote what is to be done."[8] When time permitted the crew to consult cargo owners prior to jettison, all parties involved could negotiate the terms of compensation and determine precisely the quality and quantity of goods to be cast overboard. All or at least most of the parties involved in the maritime venture, especially those passengers carrying consignments in the ship, had to agree upon throwing cargo into the sea. A prior consultation was indispensable to ensure remuneration for the merchants whose goods would be thrown overboard. During the consultation, the shipmaster could defend himself against legal allegations and crew members and passengers might contribute useful nautical skill, knowledge, and sailing experience to the decision-making process.[9] If a merchant did not accompany his cargo on board, the captain might act as the merchant's agent; in this case, he was required to consult with his mates. The shipmaster, crewmen, and merchants or their proxies were the three authorities to decide what cargo to jettison and when, provided that time permitted such a consultation. Unless they reached a consensus to cast all or part of the vessel's contents overboard, one party had no right to claim remuneration from another.[10] When an agreement was reached, the shipmaster would order the cargo to be jettisoned in the amount necessary to prevent or alleviate the danger to the vessel.[11]

Contrary to the Romano-Byzantine statutes that did not provide legal details regarding the captain's absolute jurisdiction over jettisoning cargo in perilous situations,[12] Muslim jurists empowered him,

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[8] Ashburner, *Rhodian Sea Law*, 87; Letsios, *Das Seegesetz der Rhodier*, 172–174, 178–179, 259.

[9] Ashburner, *op. cit.*, cclxiv–cclxv; Olivia R. Constable, "The Problem of Jettison in Medieval Mediterranean Maritime Law," *Journal of Medieval History* 20 (1994), 213; Ṭāher (ed.), *Akriyat al-Sufun*, 30, 33.

[10] Scott, *op. cit.*, 4:208, Digest XIV, 2, 2, 1: "Where, however, the loss occurred with the consent of the passengers, or on account of their fear, it must be made good." In other words, once the decision is made by all passengers, they collectively have to contribute and reimburse those whose cargoes were jettisoned.

[11] Article III:38; Ashburner, *op. cit.*, 112; Letsios, *Das Seegesetz der Rhodier*, 174, 264; Idris, "Commerce maritime," 239.

[12] Letsios, *Das Seegesetz der Rhodier*, 166–167; Scott, *op. cit.*, 4:207–208. The captain's authority over the seizure of the shippers' cargoes is reflected in Digest XIV, 2, 2. Servius advises the captain to detain commercial articles and private possessions

regardless of the presence or absence of the shippers, to cast overboard all or part of the shipments without obtaining the owners' consent. This rule applied in a situation when the crew did not have the luxury of time to settle contribution terms with the cargo owners.[13] If the merchants or their proxies were on board, the captain could order them to dispose of their own goods.[14] Correspondingly, Byzantine lawmakers established an explicit edict—Article III:38 of the N. N.—requiring the shipper to commence throwing his goods overboard himself, and then the crews would follow his example.[15] This ruling does not suggest that the merchant could in just any situation randomly cast overboard all or part of his goods without coordinating the type and volume of the jetsam and concluding the

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of any given sea traveler whose goods remained intact until the financial arrangements are solved and compensation is delivered to the less fortunate passengers. If the captain did bring an action on his contracts of carriage against the others whose goods were saved, so as to distribute the loss proportionally, he would be held liable to compensate the ill-fated shippers. Therefore, it is plausible to conclude that the captain enjoyed similar authority around the Mediterranean basin during the period under discussion, although the Roman-Byzantine legal codices did not refer to the matter.

[13] Ṭāher (ed.), *op. cit.*, 30, 33; Ibn Rushd, *Fatāwā*, 2:1191–1192; *idem*, *Masā'il*, 2:1051–1052; Qarāfī, *Al-Dhakhīra*, 5:490; Wansharīsī, *Al-Mi'yār*, 8:298–299, 311–312; Ibn Juzayy, *Al-Qawānīn al-Fiqhiyya*, 337; 'Abd Allāh Ibn 'Umar al-Bayḍāwī, *Al-Ghāya al-Quṣwā fī Dirayat al-Fatwā* (Al-Dummām: Dār al-Iṣlāḥ lil-Ṭabi' wal-Nashr, 1982), 1:901; Ibn Fāyi', *Aḥkām al-Baḥr*, 405–409; Qāḍī 'Iyāḍ, *Madhāhib al-Ḥukkām*, 235, 238. On p. 235, he relates an account attributed to Abū al-Ḥasan al-Lakhmī stating: "If the sea turns rough and the fear of sinking becomes imminent, which necessitates jettisoning cargoes, it is obligatory to carry it on the spot without delay. If someone called for it, his advice should be considered." He further rules that when a sinking vessel has to jettison cargo, and if the freight is composed exclusively of equivalent loads, one proceeds by drawing lots without any discrimination between their owners: men, women, slaves, and *dhimmī*s. See Idris, "Commerce maritime," 239; Kindī, *Al-Muṣannaf*, 18:60: "In case the ship owner is afraid of shipwreck, he is entitled to jettison the commercial commodities of the merchants even if they are unwilling, and I favor throwing cargo overboard when it appears necessary. It is also said that he is entitled to jettison the entire cargo, or any one owners cargo." A similar practice prevailed in the Indian Ocean. See Raffles, "Maritime Code of the Malays," 72; Winstedt and de Josselin, "Maritime Laws of Malacca," 54: "Before throwing cargo overboard in a storm, the crew has to be consulted, if they also had a share in the cargo. In that case the part of each crewmember's share in the cargo that was to be thrown overboard was to be proportionate to the size of that share. This was the captain's responsibility."

[14] Qāḍī 'Iyāḍ, *Madhāhib al-Ḥukkām*, 237, decrees: "The ship owner is authorized to ask them (*i.e.*, shippers): 'jettison your cargo in order to lighten my vessel' [*min ḥaqq ṣāḥib al-markab an yaqūl lahum {al-tujjār}: iṭraḥū matā'akum li-yakhiffa markabī*]."

[15] Letsios, *Das Seegesetz der Rhodier*, 174, 178, 264; Ashburner, *op. cit.*, 112; Freshfield, *Manual of Later Roman Law*, 203; Justice, *General Treatise*, 109; Dareste, "*Lex Rhodia*," 23.

financial arrangements with his fellow passengers and the ship's captain and scribe.

Muslim jurists posited additional scenarios as to the legal implications of the act of jettison. As a rule, a shipper was liable for the losses if he threw his merchandise overboard without consulting the captain, the crew, and his fellow shippers and passengers. If one person threw another man's goods into the sea, the former became liable for the losses.[16] But, if *A* called upon *B* to voluntarily sacrifice *B*'s cargo, *B* had no legal right to reimbursement since *A* did not promise to pay him for the loss.[17] *A* was required to indemnify *B* if *A* called upon *B* to jettison cargo and agreed to pay him for the loss.[18] *A* was also obliged to guarantee *B*'s losses if the latter made a sacrifice for the benefit of *A*.[19] If *A* called upon *B* to jettison *C*'s cargo, and *A* guaranteed *B* to indemnify *C* if the latter should seek remuneration, "the liability will be laid upon the thrower rather than the one who gave the order".[20] If *A* called upon *B* to jettison his merchandise, and the former guaranteed to remunerate one half the forfeiture, the second half to be paid by the passengers, then *B* would only be entitled to receive one half unless the passengers had already guaranteed to pay him the second half.[21] If *A* said to *B*: "Jettison your merchandise and the passengers and I guarantee to remunerate you," and then the passengers denied that they authorized *A* to speak on their behalf, *A* would be solely responsible for the entire loss. In fact, some *fuqahā'* ruled that the authorization should be regarded as invalid unless the majority of passengers on board selected him to speak on their behalf.[22]

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[16] Shāfiʿī, *Al-Umm*, 6:86; Sughdī, *Al-Nutaf*, 2:791–792; Ibn Qudāma, *Al-Mughnī*, 12:550; Qarāfī, *Al-Furūq*, 4:11; Shammākhī, *Al-Īḍāḥ*, 3:610; Kindī, *Al-Muṣannaf*, 18:59; Nawawī, *Rawḍat al-Ṭālibīn*, 7:191.

[17] Ibn Qudāma, *Al-Mughnī*, 12:550; Kindī, *Al-Muṣannaf*, 18:59; Nawawī, *Rawḍat al-Ṭālibīn*, 7:192.

[18] Abū Ḥāmid Muḥammad Ibn Muḥammad al-Ghazālī, *Kitāb al-Wajīz fi Fiqh al-Imām al-Shāfʿī* (Cairo: Maṭbaʿat al-Ādāb, 1899), 2:152; Nawawī, *Rawḍat al-Ṭālibīn*, 7:191; Ibn Qudāma, *Al-Mughnī*, 12:550; Bayḍāwī, *Al-Ghāya al-Quṣwā*, 1:901.

[19] Ibn Qudāma, *Al-Mughnī*, 12:550; Sughdī, *Al-Nutaf*, 2:792: "*wa-in qāla: Ulqī matāʿī wa-taḍmanahu lī? fa-qāla: naʿam; fa-alqāhu, ḍaminahu lahu.*"

[20] Nawawī, *Rawḍat al-Ṭālibīn*, 7:194.

[21] Ibn Qudāma, *Al-Mughnī*, 12:551; Awzajandī, *Fatāwā Kāzī-Khān*, 3:52; Nawawī, *Rawḍat al-Ṭālibīn*, 7:194.

[22] Shāfiʿī, *Al-Umm*, 6:86; Ghazālī, *Al-Wajīz*, 2:152; Ibn Qudāma, *Al-Mughnī*, 12:550–551; Nawawī, *Rawḍat al-Ṭālibun*, 7:193.

The N. N. is vague as to whether it is preferable to jettison the heaviest goods or those nearest at hand. Although this subject remained controversial among early Andalusian and North African Muslim jurists, most recommended throwing over the heaviest goods if they were reachable, regardless of their value.[23] Therefore, if someone cast accessible lighter goods overboard though the heaviest goods were accessible to the same degree, he was solely responsible for the loss.[24] This requirement raised the question of how the goods were stowed on the ship, in view of the type of voyage and whether the ship was sailing along the coast or on the high seas. In coastal navigation, goods had to be arranged in accordance with their destination: those to be unloaded first had to be most accessible. This rule probably applied to ships that made frequent stopovers.[25] Conversely, sailing across the open sea required the captain and his crew to place the heaviest goods in the bottom as ballast.[26] This rule was particularly applicable to liners sailing between two fixed ports.

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[23] Ṭāher (ed.), *op. cit.*, 43; Ibn Ḥazm, *Al-Muḥallā*, 7:27; Wansharīsī, *Al-Miʿyār*, 8:298–299, 309, 312; Ibn Rushd, *Fatāwā*, 2:1191–1193; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 238; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:658–659; Nuwayrī, *Al-Ilmām*, 2:243; Goitein, "Jewish Trade," 378–379; Ben-Sasson, *Jews of Sicily*, 229–233 [56], TS 10 J 19, f. 19, ll. 6–15. An early eleventh century document from the archive of Joseph Ibn ʿAwkal contains invaluable details that confirm this hypothesis. The sender, Ephraim Ibn Ismāʿīl al-Jawharī, an agent of Ibn ʿAwkal who managed his business with the Maghrib, describes how two ships heading for Sicily were forced to jettison one hundred bales of cargo near the Pharos: "I have already informed you that I loaded all the bales destined for Palermo and al-Mahdiyya after an arduous effort (. . .) and that the ships bound for Sicily jettisoned approximately one hundred bales. Sixteen of them belonged to my master—*may God prolong his esteem*—eight bales were in Daysūr's ship, and another eight bales were in the ship of Prince ʿAlī. Even the ships heading for al-Mahdiyya jettisoned cargo into the sea, but nothing of yours was thrown overboard since all your bales were in the hull, none on deck [*fī buṭūn al-marākib laysa ʿalā zuhūrihā*]." This document substantiates our assumption that vessels crossing the open sea carried the heaviest cargo in the hull rather than on deck, and that in time of crisis accessible cargo had to be thrown overboard first, regardless of its bulk.

[24] Ibn Ḥazm, *Al-Muḥallā*, 7:27; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 235: "Abū al-Ḥasan al-Lakhmī declared: "If the sea turns rough and the fear of sinking becomes imminent, which necessitates jettisoning cargoes, it is obligatory to do so on the spot without delay. Has someone called for it, his advice should be considered. If the passengers argue [about the kind of cargoes], the lowest value items shall first be jettisoned. If their values are similar, then the heaviest is to be cast overboard. And if their weight is similar, both are to be thrown over on the spot."

[25] Ṭāher (ed.), *op. cit.*, 44; Kindī, *Al-Muṣannaf*, 21:153; Shiqṣī, *Manhaj al-Ṭālibīn*, 12:295.

[26] Ashburner, *op. cit.*, clvi–clvii; Nuwayrī, *Al-Ilmām*, 2:234.

The practice of stowing all shippers' grain in a common pile became problematic when part of the grain was thrown overboard or got wet and damaged at sea. Take, for instance, a ship conveying cargo from Sicily to al-Mahdiyya. Upon weighing anchor, she encountered a violent gale and rough seas, and had to jettison part of her cargo of grain and return to Sicily, where the shippers discovered that the remaining grain had been drenched, diminishing its value. Did the damage done to the grain occur before the jettison or afterwards? Abū Muḥammad Ibn Abī Zayd answered:

> Those who jettisoned their goods become shareholders with those whose goods remained on board but suffered damage. The price for the owners of the damaged goods is calculated [as if they were] unspoiled, based on the market prices at the port from which they were shipped. Thus, their joint ownership of those [goods] is proportional to the price of the jettisoned goods. The price of the unspoiled goods should be reckoned on the basis of the market prices at the port from which they were shipped, as we have mentioned; the damage to the goods shall be considered as if it affected all shippers on board. This [rule is applied] as long as the goods were sound at the time of jettison and the damage occurred after they were cast overboard. However, if the damage befell goods prior to jettison, their value is based on their imperfect state in Sicily.[27]

Both Byzantine and Islamic legal codifications include the goods damaged after part of the consignments was thrown overboard in the calculation of the general average; however, shippers whose goods got wet and spoiled prior to the act of jettison could not claim remuneration unless the damage resulted from the seamen's negligence and misconduct.[28]

The foregoing discussion makes it evident that Byzantine and Islamic laws shared basic principles as to the jettison of cargo. First, the cargo could be thrown overboard only when the danger to property and human life was imminent, and provided that jettison was carried out for the sake of all. The master, crew, shippers, and passengers had to use their reasoning to determine when and what to

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[27] Ṭāher (ed.), *op. cit.*, 35; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 239–240; Wansharīsī, *Al-Miʿyār*, 8:299.

[28] Ṭāher (ed.), *op. cit.*, 43; Saḥnūn, *Al-Mudawwana*, 4:494–495; Article III:38; Ashburner, *op. cit.*, 112; Freshfield, *Manual of Later Roman Law*, 203; Justice, *General Treatise*, 109; Dareste, "*Lex Rhodia*," 23; Letsios, *Das Seegesetz der Rhodier*, 174; Leder, *Die arabische Ecloga*, 116–117, Article 28:8.

jettison. Second, although prior consultation was required, a shipmaster and his crew were occasionally entitled to throw goods overboard against their owners' will in the event that: (a) the ship was in immediate peril from the violence of the wind; (b) she was taking on a dangerous quantity of water; (c) she came to a standstill in shallows; (d) pirates or enemies pursued her; or (e) an accident, due to negligence or other cause, befell her. Third, any party who mistakenly or deliberately threw his own or someone else's cargo overboard was solely liable for the loss. Finally, the act of jettison was customarily carried out on the order of the shipmaster although it had to be performed primarily by the cargo owner or his agent, assisted by crewmen or others on board.

Commercial Commodities and Personal Effects

Except for victuals for private consumption, which could be shared by all if foodstuffs ran short during the voyage, the Digest included all personal belongings of travelers in the calculation of the general average. Thus, it classified them in the same category as any other cargo. Digest XIV, 2, 2, 2 specified:

> An agreement also arose as to whether an estimate was to be made of the clothing and rings of each person, and it was held that this should be done, and that everything should be taken into account for contribution, except what had been brought on board for the purpose of consumption, in which would be included all kinds of provisions; and there is all the more reason in this, for if, at any time during the voyage, such articles should be lacking, each one would contribute what he possessed to the common stock.[29]

Article III:9 of the N. N. also included capital assets, clothing, bedding and other property intended for the traveler's private use. The sole difference between the Digest and the N. N. relates to financial settlements. The N. N. placed a financial limit upon the value of luggage belonging to the captain, a passenger, a ship's officer, or a common sailor; crewmen seem to have contributed according to their vocational status and revenues.[30] Articles III:30, III:31, III:40, and

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[29] Scott, *op. cit.*, 4:208; Constable, "Problem of Jettison," 213; Chowdbaray-Best, "Ancient Maritime Law," 86–88.

[30] Ashburner, *op. cit.*, 87; Justice, *General Treatise*, 91; Dareste, "*Lex Rhodia*," 11; Letsios, *Das Seegesetz der Rhodier*, 188, 259.

III:41 of the same treatise have the same legal significance except that they fixed the proportion of contribution from silver and gold for the damaged items. Article III:30 required the cargo owner to contribute one-tenth of his remaining gold towards the general average if he escaped solely by his own efforts, without clinging to any of the ship's spars. If he, however, made use of any apparatus of the ship, he had to pay a fifth of the money preserved. And if the crew salvaged the shipper's silver from a wreck, Article III: 31 ruled that he had to pay them a fifth of the silver they retrieved.[31]

Article III:40 applied exclusively to passengers and fixed the proportions they had to pay: one-tenth of the value for gold, one-fifth of silver, and one-tenth for silk cloth or pearls.[32] Ashburner assumes that the percentage payable by the traveler and shipper in respect to gold and silver was unrelated to contribution, but rather was considered a reward to the crew for their exertions in saving these valuables.[33] Correspondingly, Article III:41 reiterated the principle that the passenger's luggage comprised contribution to the general average if it alone was saved.[34] The only case in which the captain was required to pay the entire contribution was when he overloaded the vessel despite the passengers' protests.[35]

Islamic law exempted personal effects in general from being averaged. Most *fuqahā'* excluded private possessions and capital assets—were they gold, silver, luggage, or even a deposit that a passenger might carry—unless intended for commercial purposes.[36] In that case,

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[31] Ashburner, *op. cit.*, 107–108; Freshfield, *Manual of Later Roman Law*, 202; Justice, *General Treatise*, 104; Dareste, "*Lex Rhodia*," 21; Letsios, *Das Seegesetz der Rhodier*, 176–177.

[32] Ashburner, *op. cit.*, 114; Freshfield, *Manual of Later Roman Law*, 204; Justice, *General Treatise*, 110; Dareste, "*Lex Rhodia*," 25; Letsios, *Das Seegesetz der Rhodier*, 176–177, 265.

[33] Ashburner, *op. cit.*, cclxii.

[34] Ashburner, *op. cit.*, 115; Freshfield, *Manual of Later Roman Law*, 204; Justice, *General Treatise*, 110; Dareste, "*Lex Rhodia*," 25; Letsios, *Das Seegesetz der Rhodier*, 265.

[35] Article III:22; Ashburner, *op. cit.*, 102–103, Freshfield, *Manual of Later Roman Law*, 203; Justice, *General Treatise*, 100; Dareste, "*Lex Rhodia*," 17; Letsios, *Das Seegesetz der Rhodier*, 158, 262; Constable, "Problem of Jettison," 214.

[36] Ṭāher (ed.), *op. cit.*, 31: "There is no difference of opinion between Mālik and his fellow jurists concerning goods that a cargo owner acquired for his private possession. No matter what the object, be it a black slave (*'abd*), a captive, a jewel that the shipper had crafted, a precious stone that he bought for his family, a slave, a weapon bought for his own private property, or a *Qur'ān* that he had illuminated for his own possession—this entire category of possession is not taken into account in calculating the value of the jettisoned cargo." Identical opinions of other jurists

the passenger had to notify the ship's scribe of the sum (gold or silver) prior to departure, and he would register it in the cargo book (*shāmil*).[37] If the captain, crew, or any ordinary passenger threw his own or another's possessions overboard, the thrower was solely held liable for the loss sustained. The loss, great or small, was that of the owner or thrower of the article rather than of the merchant, since private possessions were excluded from the rules of commerce.[38] An alternative rule excluded capital assets from contribution, regardless of whether they were meant for a passenger's commercial transactions or for private expenses such as the performance of *Ḥajj*.[39] However, a third line of reasoning included capital assets in calculating the general average; only a few Mālikī scholars of the ninth and tenth centuries subscribed to such reasoning, which echoed that of their Byzantine counterparts.[40] The learned Alexandrian jurist Aḥmad Ibn Muyassar (d. 309/921), for example, ruled: "Goods and private belongings—whether acquired for commercial purposes or personal usage, irrespective of whether they were in a context of a lease or without—all fall under an individual category. They are partners in the saved cargoes and jetsam. . . ."[41]

Assessment of General Average

Sharing forfeitures among ill-fated traders whose goods were damaged in the course of saving a vessel in distress and the fortunate ones whose shipments remained intact was the most common principle

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are repeatedly mentioned on pp. 31, 33, 36 of the same treatise; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 236, 240; Ibn Rushd, *Fatāwā*, 1:1191–1193; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:643; Wansharīsī, *Al-Miʿyār*, 8:311–312; Shammākhī, *Al-Īḍāḥ*, 3:610. Islamic law asserted that whatever the owner of the vessel purchased for commercial purposes would be included in the accounting like the property of other merchants aboard.

[37] Ṭāher (ed.), *op. cit.*, 37; Qarāfī, *Al-Dhakhīra*, 5:487; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:644; Wansharīsī, *Al-Miʿyār*, 9:115–116; Idris, *Berbérie orientale*, 2:281.

[38] Ṭāher (ed.), *op. cit.*, 31.

[39] *Ibid.*, 32, 33; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 237; Ibn Rushd, *Masāʾil*, 2:1051; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:643.

[40] Ṭāher (ed.), *op. cit.*, 32–33; Udovitch, "Eleventh Century Islamic Treatise," 50–51.

[41] Ṭāher (ed.), *op. cit.*, 32; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 236; Qarāfī, *Al-Dhakhīra*, 5:487; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:642–643; Wansharīsī, *Al-Miʿyār*, 8:298.

of contribution. Under the title *lex Rhodia de jactu*, Paulus decrees: "It is provided by the Rhodian Law that where merchandise is thrown overboard for the purpose of lightening a ship, what has been lost for the benefit of all must be made up by the contribution of all."[42] Like other maritime customs in the former Byzantine territories along the Mediterranean, later incorporated into Islamic legal codices, inasmuch as they did not contradict the *Qur'ān* and Prophetic traditions, Muslim jurists endorsed this principle from the eighth century and codified it in their digests. All shippers were bound by law to contribute proportionately to the value of the jetsam and of the undamaged goods.[43] Fortunate merchants whose cargo remained safe could not band together in an attempt to evade financial commitments to others; thus, those whose cargo remained intact could not become each other's "partners" to the exclusion of those who suffered losses.[44]

A major issue remains to be addressed, however: How were private possessions and merchandise valued? Was it according to the prices at which they were purchased, prices at the port of origin, or at the place where they were jettisoned, or at the port of debarkation? Digest XIV 2, 2, 4 ruled that contribution had to be made on such articles in accordance with the price that they would fetch at the destination port: "The estimate should be based upon not what they had been purchased for, but upon what they could be

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[42] Scott, *op. cit.*, 4:207, Digest XIV, 2. This legal attitude is affirmed by Hermogenianus (Digest XIV, 2, 5), who rules: ". . . the equity of this contribution is only admitted when the remedy of jetsam [is used] during the common danger, the interests of the others is consulted, [and] the ship is saved"; Letsios, *Das Seegesetz der Rhodier*, 165–166, 168–169.

[43] Ṭāher (ed.), *op. cit.*, 30–31, 32, 34–35: "Neither Mālik nor Ibn al-Qāsim nor any Mālikī authority, those of Medīna and those of Miṣr, argue that everything thrown from the vessel should be deducted from the goods remaining on the vessel. [The value of] the jettisoned goods should be divided by [the value of] the remaining merchandise—be it a quarter or a third. Those whose goods remained safe are to pay proportionately for those whose goods were jettisoned"; Goitein, *Letters*, 180–181: "Now, my lord, exercise your usual circumspection—may I never be deprived of you and never miss your favors—and examine with the light of God, the exalted, the case of those fifty sacks of pepper. Divide what has been salvaged in proper proportion between him and me. Originally thirty-five sacks were mine and fifteen his. So divide the remainder accordingly and explain everything clearly." See Bodl. MS Heb. d 66, f. 66*v*, ll. 4–8. This lawsuit was brought before a Jewish court in Fusṭāṭ by Joseph Lebdī (*i.e.*, from Lebda, ancient Leptis Magna) against Abū Yaʿqūb al-Ḥakīn. A copy of the court decision was sent to the representative of merchants in the port city of ʿAden.

[44] Ṭāher (ed.), *op. cit.*, 34.

sold for."[45] Cargoes were thus valued at the current market prices at the destination, not those where they were purchased, or loaded, or jettisoned. This rule apparently came into effect as soon as the ship sailed from her port of embarkation, regardless of the distance she traversed. Since the N. N. did not say how this valuation should be made, it stands to reason that the precedents set forth in *lex Rhodia de jactu* prevailed in Byzantium during the seventh and eighth centuries.[46]

Islamic maritime customs dictated various principles in assessing the monetary value of the jetsam and the cargoes that remained safe. The two cardinal factors were place and time. As for place, the *fuqahā'* debated four methods of evaluating the jettisoned merchandise. The first method decreed:

> The price of the jettisoned goods that is due their owner is based on the amount he actually paid where these goods were loaded onto the vessel. However, this only applies if no price change occurred in the market for the goods. If, however, the market has changed, going either up or down, then the purchase price of the goods is ignored, and consideration is given to the [current] value of the goods. Be they foodstuffs, textiles, raw materials, slaves or any other commercial commodity, the price is calculated as of the moment they were taken on board.[47]

The second method was based on the value of the goods where they were purchased, and applied to cases in which the goods were bought

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[45] Scott, *op. cit.*, 4:208–209.

[46] Many Medieval European maritime laws complied with the Romano-Byzantine practice of evaluating goods according to the price they would fetch at the destination. The *Law of Oléron* states that jetsam ought to be appraised 'at the produce of those which be come to safety' (Twiss, *Black Book of the Admiralty*, 2:443). In contrast, the Aragonese *Maritime Ordinances* stipulate that goods have to be appraised according to the actual price at the port of embarkation (Constable, "Problem of Jettison," 217). A third legal viewpoint presented by the *Consulate of the Sea* rules that if the jettison has taken place before the vessel has covered half the distance from the point of departure, the goods ought to be valued at what they cost at the port of departure; and if she passed at least half the distance, the goods cast overboard with those that remain safe shall be estimated at what they would be worth at the port of arrival (Constable, "Problem of Jettison," 214; Twiss, *Black Book of the Admiralty*, 3:149, 151; Ashburner, *op. cit.*, cclxxviii; Jados, *Consulate of the Sea*, 55, Article 97).

[47] Ṭāher (ed.), *op. cit.*, 31, 34, 35, 36; Qāḍī 'Iyāḍ, *Madhāhib al-Ḥukkām*, 238; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:87; 'Abd al-Rafī', *Mu'īn al-Ḥukkām*, 2:527; Burzulī, *J̌āmiᶜ Masā'il al-Aḥkām*, 3:655; Wansharīsī, *Al-Miᶜyār*, 8:311–312; Udovitch, "Eleventh Century Islamic Treatise," 49–50.

from one specific place. However, if they were purchased from different places, the assessment had to be based on current prices at the port of embarkation.[48] The third method was based on the place where the cargo was jettisoned; the jurist undoubtedly referring to the nearest coastal or inland markets where such commodities were traded.[49] And the fourth method was similar to the code set forth in the Digest in calculating contribution on the basis of the current price of the merchandise at the destination.[50] Few of the *fuqahā'* opted for the Romano-Byzantine practice ruling that the monetary value of the jettisoned and intact goods had to be calculated according to their present price at the port of destination. Rather, the great majority were inclined to reckon the value of goods on the basis of current prices at the port of origin, despite controversial opinions. In all cases, in calculating the monetary value of jettisoned merchandise, taxes paid at the point of embarkation, as Abū Bakr Ibn ʿAbd al-Raḥmān (d. 432/1040) stated, had to be excluded. However, port dues, usually payable by a lessor, were not reckoned in the calculation of general average.[51]

Less controversial was the principle of time, which revolved around the value of the jetsam when it was purchased, or when it was loaded on board. This raised a further question: How should the parties evaluate jettisoned articles not purchased at the same time? Regardless of the time of purchase, Muslim jurists ruled, jettisoned merchandise had to be evaluated on the basis of current market prices: "Differences in times (of purchase) are the same as [the differences] in towns. For example, if someone were to make the purchase a year ago and the other were to purchase a month ago, the goods will be reckoned as if he made the purchase a month ago."[52] If the

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[48] Ṭāher (ed.), *op. cit.*, 32–34; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:85–86; Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:655; Udovitch, "Eleventh Century Islamic Treatise," 50; Twiss, *Black Book of the Admiralty*, 4:39, Article 54 of the Amalfitan maritime law requires the parties concerned to assess the jetsam and remainder on the basis of their value at the port of loading.

[49] Ṭāher (ed.), *op. cit.*, 34, 36; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 238–240; Udovitch, "Eleventh Century Islamic Treatise," 50.

[50] Ṭāher (ed.), *op. cit.*, 31; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 238; Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:655; Udovitch, "Eleventh Century Islamic Treatise," 50.

[51] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 238: "The customs duty paid on goods is not included, and none of our scholars discussed it since this is an official prerogative and there is no reimbursement."

[52] Ṭāher (ed.), *op. cit.*, 34; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 238; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:85–87.

articles were loaded at different locations, however, their value had to be based on the market prices "on the day of embarkation rather than the day of purchase."[53] This leads us to the inference that the criteria for evaluating the jettisoned goods were market prices at the port of embarkation rather than anywhere else, even when the ship sailed along the coast.

Freight Charges

The nature of the contract of carriage required the carrier to deliver the consignment to the destination in the state it was received at the port of origin; the freight to be paid upon the arrival of the ship and the safe delivery of the cargo. However, an important problem arose as to the inclusion of freight charges in the general average calculation when some goods had been damaged or jettisoned during the voyage. That is to say, should the cost of shipping be deducted when goods were sacrificed for the common safety? Digest XIV 2, 2, 7 provides a relevant solution to deductions from freight for contribution, stating:

> Where property which has been thrown overboard is recovered, the necessity for contribution is at an end; but if it has already been made, then those who have paid can bring an action on the contract for transportation against the master, and he can proceed under the one for hiring, and return what he recovers.[54]

The foregoing can be interpreted as saying that the freight charges were only payable on safe delivery of the goods. If they were sacrificed, preventing delivery, then their freight charges were also sacrificed. Consequently, jettison of goods led to a right of contribution from the freight upon them, and the cost of shipping had to be reduced proportionately to the extent of the reduction in the value of the goods. If the goods were salvaged without losing their value, their owner, if he had already been compensated, had to reimburse the other shippers; in this case, the general average loss, as well as the contributions of the parties, was to be determined according to

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[53] Ṭāher (ed.), *op. cit.*, 30; Qarāfī, *Al-Furūq*, 4:9–10; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:655; Wansharīsī, *Al-Miʿyār*, 8:312.

[54] Scott, *op. cit.*, 4:209; Letsios, *Das Seegesetz der Rhodier*, 169–170.

the prices existing at the time and place where the maritime venture was intended to end.

The principles underlined in Byzantine law during the seventh and eighth centuries were slightly different. There was a fundamental disparity between the Digest and the N. N. as to the amount to be apportioned from the undamaged cargo. Article III:32 decreed that, if a ship loaded by a merchant was either put to sea to take on freight or went into a partnership, and a maritime disaster took place, then the merchant was not to ask to have half of his freight returned, and what goods were saved, together with the ship, were subject to contribution.[55] In addition, the law established that the seamen's wages too were deducted for contribution.[56]

Deductions to be made from freight charges occupied Muslim jurists as well. A major question they addressed was how to calculate the deduction from freight for contribution. Where jetsam was recovered but lost half of its value, other shippers would have to contribute proportionately to the value of the unlucky shipper's goods, provided he paid both the freight charges for his own remaining goods and for the salvager's labor. The freight charges would not normally be subject of contribution, because they were generally conditioned upon arrival of the goods; a shipper whose goods were jettisoned had the right to recover the freight charges for them.[57] However, freight or a proportion thereof was due for goods that arrived safely, and thus could be considered a general average contribution. Where the shipper had advanced the freight for shipping, the lessor would have to include the whole or a fixed proportion for a general average contribution upon a total or a partial loss of the goods.[58] The Corpus Juris Civilis, N. N., and A. S. all asserted that the freight could not be at risk unless paying it depended upon the safety of the cargo or of the ship.

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[55] Ashburner, *op. cit.*, 108; Letsios, *Das Seegesetz der Rhodier*, 176, 263.

[56] Ashburner, *op. cit.*, 87–91; Justice, *General Treatise*, 91; Dareste, "*Lex Rhodia*," 11; Letsios, *Das Seegesetz der Rhodier*, 188, 259.

[57] Ṭāher (ed.), *op. cit.*, 35; Gil, *In the Kingdom of Ishmael*, 2:527 [180], TS 10 J 19, f. 19, ll. 23–24.

[58] Ṭāher (ed.), *op. cit.*, 35; Noble, "Principles of Islamic Maritime Law," 234–235.

Valuation of the Ship for Contribution

Another issue that Romano-Byzantine jurists debated was the legal status of the ship, which changed as soon as goods were cast overboard. One group of jurists did not grant contribution in respect to damages to the ship, ruling that cargo owners were exempt from contribution if damages to a ship or jettisoning her mast and rigging became necessary due to rough seas. Incidental damage requiring the ship owner to make repairs at his expense did not entail compensation from the shippers.[59] Another group included the vessel in the calculation of the general average in the event of deliberate jettison. If she was damaged, or lost equipment and tackle to save the cargo, the ship owner had the right to collect contribution from the shippers, especially if the jettison and loss occurred with the consent of passengers and shippers, or on account of their fear of sinking.[60] However, a third legal view exempted the merchants who saved their own shipments from paying contribution to the ship owner or to their less fortunate companions if the vessel and the others' cargo were lost.[61]

Sails, yards, masts, tillers, anchors, and rudders were parts of the ship's tackle and rigging to be averaged.[62] The law distinguished, however, between the legal status of a ship on her way to loading [Articles III:27 and III:32], at the port of embarkation [Articles III:28 and III:29], during the voyage [Articles III:30 and III:31], and after reaching her destination [Article III:33]. In the first situation, the ship owner was not entitled to seek compensation from the shippers if it was established that his vessel was wrecked through the carelessness of the seamen or captain, while the goods were still in the warehouses. If, however, the ship was wrecked in a gale while the cargo awaited loading, what was saved from the ship together with the shipment in the port of origin had to be averaged.[63] This principle

[59] Scott, *op. cit.*, 4:211, Digest XIV, 2, 6; Letsios, *Das Seegesetz der Rhodier*, 178.

[60] Scott, *op. cit.*, 4:209, Digest XIV, 2, 3; Digest XIV, 2, 5, 1.

[61] *Ibid.*, 4:208, Digest XIV, 2, 2, 1; 4:209–210, Digest XIV, 2, 4, 1; 4: 211, Digest XIV, 2, 5, 1; Digest XIV, 2, 7; Thomas, "Carriage by Sea," 153.

[62] Articles III:35; III:43; III :44 ; Ashburner, *op. cit.*, 110, 117; Letsios, *Das Seegesetz der Rhodier*, 264, 265.

[63] Ashburner, *op. cit.*, 105–106: "A ship is on her way to be freighted by a merchant or a partnership. The ship is damaged or lost by the negligence of seamen or of the captain. The cargo which lies in the warehouse is free from claims. If evidence is given that the ship was lost in a storm, what is saved of the ship is to

in fact contradicted Islamic law, whereby the leasing contract became valid only after the ship passed safety inspections, was fully equipped and awaited loading at the dock. Liability of the captain and his crew for the safety of the cargo began as soon as the goods were taken from the warehouse, brought to the terminal, and delivered by the owner to the carrier. Captain and crew were held responsible for the goods so long as damage arose not from their carelessness, but from force majeure, enemy and/or pirate attack or the like.[64]

Articles III:28 and III:29 applied to cases in which the ship was anchored in a harbor, waiting to be loaded. If the ship owner brought his vessel to the port of embarkation, but the merchant or his partner was reluctant to load his consignments, so that the time appointed for sailing passed, and the vessel was damaged by pirates, fire or wreck, the shipper was obliged to compensate the ship owner. However, if the lessor was found negligent, he had to bear all damages suffered by the ship; the responsibility was that of the negligent party, whether shipper or carrier.[65] The only difference between

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come into contribution together with cargo and the captain is to retain the half-freight. . . ." Article III:27 bears the same legal significance as Article III:32 stating: "If a ship is on its way to be loaded, whether it is hired by a merchant or goes in partnership, and a sea disaster takes place, the merchant is not to ask back the half-freight, but let what remains of the ship and the cargo come to contribution. . . ." Letsios clearly draws the lines between damage that results from the carelessness of the captain and seamen and that which occurs by irresistible force. In the former, the shipper is absolved from paying the freight and contributing for the loss or damage to the ship, whereas in the latter the shipper(s) must pay the freight charges and divide the loss with the ship owner(s) in case of shipwreck or damage to the vessel. See Letsios, *Das Seegesetz der Rhodier*, 175–176.

[64] Khalilieh, *Islamic Maritime Law*, 79–82.

[65] Ashburner, *op. cit.*, 106–107; Letsios, *Das Seegesetz der Rhodier*, 157–158, 263. Muslim jurists hold the shipper liable to compensate the ship owner if the former unilaterally breaches the contract when the ship moors in the quay to await loading. In his *Muṣannaf* (21:154–155), the Khārijite jurist al-Kindī was asked about a merchant who leases a vessel to convey his merchandise to a specific destination, but she does not sail at the appointed time, must he pay the freight charges? And what would happen if the ship owner refused to sail at that time claiming difficulties in crossing the sea? He replied: "If the merchant, without a compelling reason, refuses to load the shipment, he has to pay the duties. If the delay in sailing results from the ship owner, after the convoy of vessels has headed back and the sea has been closed, the merchant should be exempt from paying the transportation fee and be allowed to unload his shipment." A similar legal opinion was expressed by al-Awzajandī (d. 592/1196), *Fatāwā Kāzī-Khān*, 2:287. He was asked about a ship owner who brought his vessel to transport a shipment from one location to another, but discovered that the shipment was not in the port. The *qāḍī* ruled: "The lessee

Articles III:28 and III:29 was in regard to the loading schedule. Both parties were required to make contribution if the cargo owner was not ready with his shipment at the embarkation port within the time fixed in the contract and the vessel was then lost to pirates, fire or shipwreck, provided that the loading and sailing time had not expired when these events occurred.[66]

Articles III:30 and III:31 detailed the amount of indemnity that cargo owners and passengers had to contribute in case of shipwreck. Capital assets, personal effects, and commercial items saved on board would become sources of contribution for the loss. Nonetheless, a statement in Article III: 30 ruled that if the shipper escaped solely by his own efforts, without using any of the ship's gear, he should pay only half the rate. However, if for safety's sake he clung to one of the ship's spars, he would have to pay one-fifth of the money rescued.[67] This statement affirms that: (a) in case of shipwreck travelers had to pay half the transportation charges, since they were brought closer to their ultimate destination; and (b) even if the shipment was lost, the ill-fated passenger and merchant had to compensate the ship owner, the amount due depending on whether the traveler was saved with or without using the ship's gear.[68] If the ship was saved, her captain and crew had to assist in the salvage. The ship, her tackle and equipment, and the remaining safe cargo were then subject to contribution.

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must indemnify the ship owner an incomplete *kirā'* since the ship sailed empty when she headed to the port of embarkation." Notice, the lessee had to pay partial remuneration only for the trip departing from the original port. One may assume that he had to pay the whole freight on the return voyage as if the ship were transporting the consignment. The major difference between Byzantine and Islamic maritime practices was that in the former the shipper was held responsible for the damage incurred to the ship on her way to loading, while Islamic law required the shipper to pay the freight charges only.

[66] Ashburner, *op. cit.*, 106–107; Freshfield, *Manual of Later Roman Law*, 201–202; Justice, *General Treatise*, 103; Dareste, "*Lex Rhodia*," 19; Letsios, *Das Seegesetz der Rhodier*, 176.

[67] Ashburner, *op. cit.*, 107; Freshfield, *Manual of Later Roman Law*, 202; Justice, *General Treatise*, 104; Dareste, "*Lex Rhodia*," 21; Letsios, *Das Seegesetz der Rhodier*, 176, 263.

[68] I have not come across such a *dictum* in the Islamic Mediterranean territories. Muslim jurists of the Near East, North Africa, and Spain enjoined seamen to assist persons in distress at sea. It is obligatory so long as such a rescue does not compromise the safety of the other vessel by overloading. On the contrary, a thirteenth century law from Islamic Malay permitted the captain to rescue passengers in distress at sea, giving him the right to collect transportation charges and enslave them if they or their families could not redeem them. See, Khalilieh, *Islamic Maritime Law*, 155.

To cope with other aspects of the subject of contribution, Rhodian lawyers introduced rules pertaining to shipwreck at the port of destination. Article III:33 ordered a shipper to contribute to damages to the ship if his cargo had not been discharged and stored, and the ship was still anchored in the agreed terminal. However, if the merchant unloaded his goods in the place fixed by the contract, and anything happened to the ship thereafter, the unloaded goods were not liable to contribution for damage to the rest of the cargo or to the ship. But if any goods remained on board, they were liable to contribution with the ship.[69]

It is important to note that all of the rulings in the previous discussion were also applicable to cases of partnership. Where a partnership was formed between the ship owner and the cargo owners, the latter had to pay contribution in the event of damage to the cargo, the vessel, or both: "If there is an agreement for sharing in gain, after everything on board the ship and the ship itself have been brought into contribution, let every man be liable for the loss which has occurred in proportion to his share of the gain."[70] Contribution was payable for the losses incurred not only to the ship, but to her contents as well. Summing up, each party contributed in accordance with his share in the transaction.

The legal status of the ship was in dispute among Muslim jurists around the Mediterranean. Some jurisprudential decisions were compatible with the Romano-Byzantine viewpoint and excluded the ship from the general average, while others agreed with the N. N. and included her when assessing the value of the jetsam and intact cargoes. Neither the ship nor her tackle was subject to contribution when assessing the value of the jettisoned merchandise.[71] The advo-

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[69] Ashburner, *op. cit.*, 109; Justice, *General Treatise*, 105; Dareste, "*Lex Rhodia*," 21; Letsios, *Das Seegesetz der Rhodier*, 176, 263.

[70] Ashburner, *op. cit.*, ccxlii–ccxliii, 87. During the sixth and seventh centuries when the annual wage of the ordinary worker was six *nomismata*, a shipwright received two *nomismata* monthly. *Nomisma* generally meant a coin, more specifically the standard 24 *keratia* gold coin that was the basis of the late Roman and Byzantine monetary system. The Byzantine *nomisma* was thus identical to the Roman *solidus*. For further details on the seamen's annual income during the seventh and eighth centuries C.E., consult Letsios, *Das Seegesetz der Rhodier*, 131–132.

[71] Muḥammad Ibn ʿAbd al-Ḥakam (d. 268/881) decrees: "Our companions agreed upon the exclusion of the vessel from the principles pertaining to jettisoning, except for our ʿIrāqī companions who contend that the vessel and the vessel's slaves, tackle, and contents—be they for commercial purposes or private possessions—are included

cates of this view held that "it is inappropriate to include the ship within the calculations and principles of the general average, since this situation is similar to a camel who lacked strength in the middle of the way and could not carry the load thereafter. The camel master, in this case, is allowed to throw the load off the camel without being bound to remunerate the owner of the merchandise."[72] In other words, when a lifeboat, masts, ropes, and another ship's tackle were thrown overboard, they would not be included in the general average.[73] Had someone jettisoned the vessel's tackle, he alone would be held liable for the losses incurred.[74] A second group, however, included the ship and her rigging in assessing losses regardless of the motive and the circumstances that forced the captain, crew, and passengers to jettison cargo. This argument suggested that if the ship was either damaged or wrecked, but goods were saved, they were subject to contribution. Likewise, if the cargo was lost but the ship saved, the latter would be included within the principle of general average. These rules could be implemented when local custom allowed the inclusion of a commercial ship under the category of the general average.[75] The last group of jurists declared the vessel subject to contribution if it was established that her owner had jeopardized his vessel either by sailing in tempest conditions or ignoring the regulations against overloading. In both situations, the ship owner had to reimburse the merchants for the damage they incurred if they protested against his actions.[76]

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in the calculation of the general average. Saḥnūn reiterated in the book of Ḥabīb Ibn Naṣr (201–287/816–900) . . . that the vessel's servants are included in the calculation in terms of the value of the jetsam." Ṭāher (ed.), *op. cit.*, 36; Qarāfī, *Al-Furūq*, 4:10; Nuwayrī, *Al-Ilmām*, 2:244.

[72] Qarāfī, *Al-Furūq*, 4:10. A similar analogy is presented in the Digest XIV, 2, 2, 2, stating that if the ship suffers damage or loses any of her gear and the cargo is unharmed, no contribution is due, because there is a distinction between property relating to the ship and property on which the freight is paid; after all, "the damage arising when a smith breaks his anvil or hammer would not be charged to the customer who gave him the work." But a loss at sea fails to be made good if it arises from a decision of the cargo-owners or a reaction to some danger.

[73] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 236; Qarāfī, *Al-Furūq*, 4:10.

[74] Ṭāher (ed.), *op. cit.*, 52.

[75] *Ibid.*, 35, 36; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 235, 237–240; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 8:498; Qarāfī, *Al-Dhakhīra*, 5:487; *idem*, *Al-Furūq*, 4:10; Nuwayrī, *Al-Ilmām*, 2:244; Burzulī, *J̌āmiᵏ Masāʾil al-Aḥkām*, 3:657; Wansharīsī, *Al-Miʿyār*, 8:299, 306.

[76] Ṭāher (ed.), *op. cit.*, 50; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 235.

Piracy, a formidable threat to merchantmen, preoccupied jurists throughout history and gave rise to various scenarios, with their resulting legal implications. When a commercial ship was captured by pirates, the Digest ruled, everyone on board had to pay a contribution if she was ransomed from them; however, the cargo owners had to bear the loss of any property the pirates seized, and whoever ransomed his own goods could not claim contribution from other shippers.[77] The law distinguished between cases where the ship was redeemed and where a person redeemed his own goods. In the first situation travelers were obliged to contribute, while in the second, the cargo owner personally bore the entire expense of redeeming his commodities. Islamic law suggested that if pirates captured the cargo but released the vessel, cargo owners had to pay the freight; they were exempt, however, from paying the freight if pirates seized the vessel.[78] This principle was implemented on condition that the danger from assaults by pirates could not have been anticipated and the ship manager sailed in "the known trunk routes," not deviating from his course.[79] In most cases, shippers whose cargo was captured by pirates were exempt from freight charges.

Both Byzantine and Muslim jurists treated the assessment of the value of a vessel for the purposes of a general average contribution, and appear to have held comparable points of view. The vessel under Byzantine law was assessed according to her carrying capacity. Furthermore, deductions were made either for her age or for her equipment and tackle. A new ship with all her rigging was valued at fifty [50] pieces of gold for every thousand [1,000] *modii* of capacity, whereas an old ship was valued at thirty [30] pieces of gold for every thousand [1,000] *modii* after a deduction of forty percent [40%], and the balance of losses were made up by contribution. In other words, the average assessment of a new vessel was fifty [50] *solidi* per six and a half [6.5] tons of capacity, whereas an old one was assessed at thirty [30] *solidi*.[80] From the Islamic legal viewpoint, not

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[77] Scott, *op. cit.*, 4:209, Digest XIV, 2, 2, 3.

[78] Raṣṣāʿ, *Sharḥ Ḥudūd Ibn ʿArafa*, 2:525.

[79] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225.

[80] Ashburner, *op. cit.*, 63, Article II:16; Freshfield, *Manual of Later Roman Law*, 206; Justice, *General Treatise*, 83; Dareste, "*Lex Rhodia*," 29; Letsios, *Das Seegesetz der Rhodier*, 132, 174–175, 255; McCormick, *Origins of the European Economy*, 406–407. Article 54 of the *Amalfitan Table* specified that a vessel should be valued in accordance with her actual price at the port of embarkation. See Twiss, *Black Book of the Admiralty*, 4:39.

all equipment and rigging of a vessel were subject to contribution; only tackle, essential to maneuver the vessel, was included in the category of the general average. The vessel was valued as if intended for sale. A ninth century formula for composing a ship sales contract, by al-Ṭaḥāwī, required the parties to indicate all the items essential to the ship's ability to navigate on rivers or on the high seas.[81] Sales contracts generally included a full description of the ship's type, her external and internal structures, and her equipment including tackle, cables, ropes, baskets, nautical instruments, anchors, cabins, sails, masts, and levels.[82]

To assess damage sustained and the ship's actual current value, both Byzantine and Islamic sea laws required judges to appoint experts in maritime technology and shipbuilding, to examine a ship before she was sent for repair. That is to say, the contributory value of the ship was based upon her condition on arrival at the port of final debarkation before repairs.[83] Once judicially mandated procedures were completed, the ship owner could either pay the merchants in cash, or, if he did not have the money available, the shippers could involuntarily become co-shareholders in the vessel. Otherwise, the owner could offer his vessel for sale so he could compensate the shippers. The law also obliged a merchant to reimburse the ship owner if the vessel was wrecked. If the former could not meet his obligation, the ship owner would have a lien upon the

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[81] Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:266–267; Ṭāher (ed.), *op. cit.*, 52: Ibn Abī Zamanīn (324–399/936–1008) states: "All equipment of the ship, such as the *qārib*, ropes, or cooking pots, are the responsibility of the owner of the vessel. This ruling is advocated by some of our senior jurists who excluded these items in their judicial paradigm. However, the ship owner is not held responsible for the masts and the external parts of the vessel which are needed to propel the vessel." Concerning Romano-Byzantine Egypt, see Hunt, *Oxyrhynchus Papyri*, 250–253, Oxy. 2136; Porten *et al.*, *Elephantine Papyri*, 486–490, P. Lond. V 1726; Casson, *Ships and Seamanship*, 257–258.

[82] Qarāfī, *Al-Dhakhīra*, 1:355; Nuwayrī, *Nihāyat al-Arab fī Funūn al-Adab* (Cairo: Al-Mu'assasa al-Miṣriyya al-'Āmma lil-Ta'līf wal-Tarjama, 1964), part 9:30–34; Minhājī, *Jawāhir al-'Uqūd*, 1:95.

[83] Scott, *op. cit.*, 15:167, 168, CJ 11.5.1, CJ 11.5.3, CJ 11.5.5, CJ 11.5.6; Pharr *et al.*, *Theodosian Code*, 399–400, Articles CTh 13.9.1, CTh 13.9.6; Sirks, *Food for Rome*, 214–215; Ṭāher (ed.), *op. cit.*, 45–46; Ibn Bassām, *Nihāyat al-Rutba*, 148, 157; Burzulī, *Jāmi' Masā'il al-Aḥkām*, 3:89; Kindī, *Al-Muṣannaf*, 21:153–154: "The judge is required to assign two notaries of good repute who are acquainted with ships building and deficiencies [*fa-li-ya'mur al-ḥākim 'adlayn min ahli al-ma'rifa bi-dhālik al-'amal wa-'uyūb al-qawārib*]." The decision reached by two magistrates with experience in maritime incidents is mandatory and must be accepted by the disputants.

merchant's preserved and salvaged goods for general average. The ship owner was entitled to detain a certain quantity of the cargo, not in excess of his entitlement.[84] The Digest provided an identical ruling, establishing that the captain did not have to bear any loss due to the insolvency of a passenger resulting from jettison, since "he is not obliged to inquire into the financial resources of everybody" prior to undertaking the voyage.[85]

Despite the clarity of Byzantine and Islamic laws, neither system pointed out precisely where the assessment for the contribution was to take place. In other words, was the vessel to be valued in her current condition based on her cost at the port of origin, or place of jettison, or at her next port of call or final destination? The only plausible resolution appears to be that the contributory value of the ship was associated with the price or value of the goods at the port of final debarkation. *Lex Rhodia de jactu* (Digest XIV, 2, 2, 4) plainly ruled that contribution was to be made on the basis of the price the goods would fetch at the destination. In the light of this rule, it is probable that the vessel's value was based on her actual condition and her cost at the port of destination. What then did the Roman legist mean by "port of destination," especially if a vessel was leased to several trading places on the same voyage? In such a case, "destination" could mean anywhere between the nearest and furthest trading-place for which the vessel was destined. By contrast, the great majority of Muslim jurists tended to estimate her monetary value on the basis of her current condition and cost at her port of origin, *i.e.* the homeport. However, whether the parties involved were required to accept the highest or lowest valuation of the vessel is unclear, although if the ship were sold at auction jurists would probably consider the highest cost.

Human Jettison and Contribution for Lives

The shipmaster and his crew, according to the Digest, were required to deliver the human cargo (slaves) safely to the prescribed destination. Where the shipmaster failed to do so, he and his crew would,

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[84] Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 10:547–548.
[85] Scott, *op. cit.*, 4:209, Digest XIV, 2, 6.

on accepted principles, be liable for the losses.[86] In the absence of dereliction, however, the captain and his crewmen were absolved of liability. Thus, if a slave was injured in transit, even if the injury healed, the captain was accountable to the merchant. If the slave's injury was chronic or permanent, the captain was held liable for his or her value. Even though the cost of slaves differed according to the purpose for which they were purchased, Romano-Byzantine lawyers fixed the exact amount of the contribution for their injury or loss in the Digest. However, it draws a legal distinction between slaves as commodities and slaves as private possessions, by exempting the owner who buys slaves for private use from import duties.[87]

Although the problem of human jettison is scarcely dealt with in the Justinianic Digest, this does not necessarily mean that human beings were not jettisoned in times of peril. On the contrary, a careful examination of the Digest proves that the issue of human jettison was familiar to Romano-Byzantine legislators, although they did not explicitly refer to it. In the Digest XIV 2, 2, 5, the lawyers make a clear distinction between slaves who fall sick and die naturally and those slaves who voluntarily cast themselves into the sea trying to escape: "No estimate should be made of slaves who are lost at sea, any more than where those who are ill die on the ship, or throw themselves overboard." Possibly, this quotation refers to slaves forced to abandon the vessel as well. The slave merchant (slaver) or owner could not claim contribution for a deceased or runaway slave but might do so if his human cargo was jettisoned for the general safety of the ship, her crewmen and freemen. In this case, the amount of loss had to be distributed in proportion to the value of the property, provided that no appraisal was made of the persons of freemen.[88] In sum, while free persons were categorically excluded from general average contribution, the Digest included slaves in the calculation of the general average since they came under the heading of "things."[89]

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[86] *Ibid.*, 4:211, Digest XIV, 2, 10: "If you have made a contract for the transport of slave, freight is not due to you for a slave who died on the ship. Paulus says that, in fact, the question is what was agreed upon, whether freight was to be paid for those who were loaded on the ship, or only for those who were carried to their destination? And if this cannot be established, it will be enough for the master of the ship to prove that the slave was placed on board."

[87] *Ibid.*, 11:288–289, Digest L, 16, 203; 9:23, Digest XXXIX 4, 16, 3, 10.

[88] *Ibid.*, 4:208, Digest XIV, 2, 2, 2; Constable, "Problem of Jettison," 209–211; Chowdbaray-Best, "Ancient Maritime Law," 87.

[89] Chowdbaray-Best, "Ancient Maritime Law," 87.

The N. N. clarifies this issue better than the Digest, distinguishing between slaves carried for private services and those transported as commercial goods. It stipulates that the value of domestic slaves is fifty percent [50%] higher than slaves who are merely merchandise. Article III:9 decrees that a slave or a ship servant not transported for sale should be valued at three *mina*s, while one who is bought for commercial purposes has a value of two *minas*.[90] The amount of contribution for a slave bought for private use thus exceeded that for a slave who was merely merchandise by one *mina*.[91] Although market value obviously depended on the slave's build, sex, age, and ethnic origin, the N. N. dealt with the slave issue only in a general sense.

Islamic law provided more detail on the issue of forcing human beings, slaves or otherwise, to abandon ship during times of extreme danger. Although the subject remained controversial, most Muslim jurists opposed the practice, and condemnation of human jettison was widespread. Al-Qarāfī opposed throwing any human being overboard in any circumstance.[92] The Mālikī jurist Saḥnūn held a similar view, as did the Andalusian jurist Ibn Ḥazm, who prohibited it "even if the matter dealt with captives of the polytheists."[93] Ibn al-Jahm forbade sacrificing slaves for the sake of others due to the tacit prohibition in Islamic law.[94]

Another group of jurists approved of sacrificing some lives if it would save a larger number, regardless of the ethnic, religious, or social allegiance of the individuals on board.[95] However, when there was no choice but to force some passengers to abandon ship, they had to be treated equally and chosen by lot. Al-Qāḍī ʿIyāḍ dictated:

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[90] Ashburner, *op. cit.*, 87; Justice, *General Treatise*, 91–93; Dareste, "*Lex Rhodia*," 11; Letsios, *Das Seegesetz der Rhodier*, 173, 259.

[91] Ashburner, *op. cit.*, 90; Letsios, *Das Seegesetz der Rhodier*, 173, three *mina*s for a passenger's personal slave versus two *mina*s for a slave as cargo.

[92] Abū Ḥāmid Muḥammad Ibn Muḥammad al-Ghazālī, *Al-Mustasfā min ʿIlm al-Uṣūl* (Beirut: Mu'assasat al-Resālah, 1997), 2:430–436, esp. 434; Qarāfī, *Al-Furūq*, 4:11: "If there are only passengers on board, it is disapproved to throw over the side any person for the sake of others even if he is a *dhimmī*."

[93] Saḥnūn, *Al-Mudawwana*, 4:27; Ibn Ḥazm, *Al-Muḥallā*, 7:27; Aḥmad Ibn ʿAbd al-Raḥmān Ḥalūlū, *Al-Masā'il al-Mukhtaṣra min Kītāb al-Barzalī* (Beirut: Dār al-Madār al-Islāmī, 2002), 187–188.

[94] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 238; Qarāfī, *Al-Furūq*, 4:10; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:526–527; Noble, "Principles of Islamic Maritime Law," 229–230.

[95] Ibn Ḥazm, *Al-Muḥallā*, 7:27; Qarāfī, *Al-Furūq*, 4:11.

Aside from commercial commodities, if there were only passengers left, they were, after [the victims] had been chosen by lot,[96] indiscriminately subjected to being thrown overboard, regardless of their social status and allegiance, whether they were males or females, slaves or freemen, Muslims or *dhimmīs*.[97]

Abū al-Ḥasan al-Lakhmī [d. 478/1080] decreed: Concerning the jettison of possessions [including slaves], regardless of whether they were purchased for commercial or private purposes, all of them are subject to contribution. If they sailed in the vicinity of the coast, or the vessel was shaken fiercely by the wind and the ship owner manages to face it up, then it is prohibited [to jettison a slave]. Had they sailed far from the shore and the slave's owner cannot swim well or his overweight cannot keep him afloat, the slaves should be considered for jettison.

Muḥammad [Ibn al-Mawwāz 180–269/796–882] decreed: On the basis of this precept, one should take into account the distance of a vessel from the shore, as well as the capability or incapability of slaves to swim; the same rule is pertinent to freemen for those jurists who apply this ruling to them.

Al-Lakhmī stated: The law school jurists agreed upon the exclusion of freemen in the calculation of the general average. Moreover, the responsibility for the losses does not rest on their shoulders, regardless of whether they have cargo on board or not. However, some jurists embraced by analogy the doctrine that they are held liable for the losses since jettisoning someone's cargo saved the lives of those who did not have commodities on board. Ibn Yūnus [d. 361/972] also ruled that this is the correct legal reasoning. Al-Lakhmī said too: It is more appropriate to include these slaves who were acquired for private possession and commercial purposes. If it were a female slave, her master has no other choice, either by converting her [through marriage], or keeping her as an infidel.

Ibn al-Jahm dictated: Slaves shall not be thrown overboard, even if they were acquired for commercial purposes, due to the tacit prohibition of Islamic law. Were the law to allow the sacrifice of slaves, it would be necessary to consider freemen.[98]

The jettison of human cargo was most likely considered only after material commodities and animals had been thrown overboard.[99]

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[96] Buzurg Ibn Shahriyār, *Kītāb 'Ajā'ib al-Hind*, ed. and compiled by Yousef al-Sharouni (London: Riad el-Rayyis, 1989), 58–59. Even if the victims were chosen by lot, it was most likely that the captain and crew were the last to relinquish the vessel since they were "bound by oaths not to abandon her."

[97] Qāḍī 'Iyāḍ, *Madhāhib al-Ḥukkām*, 235; Ibn Ḥazm, *Al-Muḥallā*, 7:27; Burzulī, *Jāmiᶜ Masā'il al-Aḥkām*, 3:658.

[98] Qāḍī 'Iyāḍ, *Madhāhib al-Ḥukkām*, 238; Burzulī, *Jāmiᶜ Masā'il al-Aḥkām*, 3:643.

[99] Burzulī, *Jāmiᶜ Masā'il al-Aḥkām*, 3:659.

Islamic jurisprudence determined that if human jettison was necessary, pagans would be thrown overboard before Muslims, men before women, and war captives before slaves.[100] Al-Lakhmī decreed, however, that two factors had to be considered before throwing a slave overboard: (a) the ability of the slave to swim ashore; and (b) the distance of the ship from the coast.[101] Strong swimmers among the slaves were to be thrown overboard if the coast was in sight.

As noted above, the legal status of slaves depended on whether they were purchased for commercial or private use. In the latter case, they were not subject to contribution. According to the *qāḍī* Ibn Abī Maṭar (d. 337/948):

> All humans, be they freemen or white slaves (*mamālīk*), acquired for personal purposes, are excluded [from the calculation] with the exception of merchants' slaves, whose value is calculated in the same way as the value of commodities. Neither the ship owner, nor the vessel's crew, be they freemen or white slaves, nor those who travel without cargo, are subject to contribution.[102]

Commercial slaves, on the other hand, were treated like other commodities and articles on board. They were subject to general average contribution so that their owners had to share the losses with other merchants who were owners of the jetsam, in proportion to their value. Following the principle of the general average, a slaver whose slaves remained safe was obliged to pay proportionately to cover the losses of those whose goods and slaves were jettisoned.[103]

The assessment of the monetary value of a jettisoned slave depended on his/her place of origin, gender, age, appearance, physical condi-

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[100] Shammākhī, *Al-Īḍāḥ*, 3:610. He advocates throwing non-Muslim captives overboard to save the lives of Muslim naval warriors and seamen.

[101] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 238; Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:643, 659.

[102] Ṭāher (ed.), *op. cit.*, 33; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:527–528; Qarāfī, *Al-Furūq*, 4:10; *idem*, *Al-Dhakhīra*, 5:487: "Neither the ship owner, nor the vessel's servicemen, be they freemen or white slaves—except for those purchased for commercial purposes—are included in the calculation of the general average. Likewise, those who do not have commodities are classified in the same category. However, all means by which those traveling by sea aim to profit from commercial transactions are subject to contribution." Nuwayrī, *Al-Ilmām*, 2:243: ". . . Likewise, the value of property one is forbidden to jettison such as slaves and slave-girls intended for commercial purposes is included in the apportionment [of losses]."

[103] Ṭāher (ed.), *op. cit.*, 31–32, 36; Udovitch, "Eleventh Century Islamic Treatise," 49; Ashburner, *op. cit.*, cclxxv; Freshfield, *Manual of Later Roman Law*, 211; Constable, "Problem of Jettison," 217.

tion and abilities.[104] The slave's price was calculated the moment he/she was taken on board.[105] Again, when the monetary value of the jettisoned slaves and commercial articles was calculated, taxes paid at the point of embarkation had to be excluded as a nonrefundable official prerogative.[106]

The questions of when to throw human beings overboard, and, if so, whom, remain unresolved in the N. N. Except for some insignificant modifications regarding the assessment of the jettisoned slaves, Byzantine jurists largely preserved Roman maritime customs. They distinguished between slaves acquired for commercial purposes and those for private services: the latter were more expensive than the former. For example, a slave who served as a *peculium* (manager/operator) on board a ship held the status of captain. He and other operators of the vessel, were they freemen or slaves, could not be cast into the sea because the vessel could not sail without them and their nautical experience. The Digest authorizes the *peculium*, after consultation with the parties involved, to cast cargo and passengers overboard for the safety of the ship. Therefore, if an altercation arose between the *peculium* and the shipper, legal allegations were brought against the ship owner rather than his employed slave.[107]

Romano-Byzantine and Islamic laws of the sea were similar in that both distinguished between slaves purchased as merchandise and those bought for household use.[108] Slaves serving on the ship were an integral part of the crew, and were therefore excluded from the category of the general average. As distinguished from Islamic law, Romano-Byzantine legal codes covered the issue of human jettison

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[104] R. Brunschvig, "'Abd," *The Encyclopaedia of Islam* (Leiden: E.J. Brill, 1960), 1:32–33; Goitein, *Mediterranean Society*, 1:130–147; *idem*, "Slaves and Slave-girls in the Cairo Geniza Records," *Arabica* 9 (1962), 1–20. According to documents from the Cairo Geniza, female slaves were far more numerous and costly than male slaves. A descending order of value made whites more costly than blacks; young slaves more expensive than older ones, and some slaves were more valuable because they were less available. Moreover, almost all transactions in this documentary evidence were made for cash, even though business was commonly conducted on credit. Finally, contracts commonly required a sales tax (literally, the dues of the market) to be paid.

[105] Ṭāher (ed.), *op. cit.*, 31.

[106] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 238.

[107] Scott, *op. cit.*, 4:200–205, Digest XIV, 1, 1, 1; Digest XIV, 1, 1, 3; Digest XIV, 1, 1, 22; Digest XIV, 1, 4, 2; Digest XIV, 1, 4, 3; Digest XIV, 1, 4, 4; Digest XIV, 1, 5, 1; Digest XIV, 1, 6; Chowdbaray-Best, "Ancient Maritime Law," 89.

[108] Ṭāher (ed.), *op. cit.*, 31, 36; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 236, 240; Wansharīsī, *Al-Miʿyār*, 8:311; Shammākhī, *Al-Īḍāḥ*, 3:610.

inadequately. This lack of attention can be justified by the mere fact that *free* human lives were not assessable or subject to general average contribution. Romano-Byzantine lawyers were probably more concerned with financial issues arising from jettison than with the jettison of freemen, given their greater concern with commercial goods rather than with cases involving human beings.

Choice of Forum and Evidentiary Issues

Among the issues that preoccupied both Byzantine and Muslim judges in adjudicating maritime claims were the proper jurisdiction in which adjudication should take place; the appropriate procedures by which the parties were to obtain evidence regarding whether jettison was justified; and the proper methods for determining the quantity of jettisoned cargo and evaluating the credibility of witnesses.

Several judicial methods were employed to settle claims and to reach evenhanded rulings. Among the most important of these were oral depositions of the crew and passengers, written evidence—such as leasing contracts, cargo books, bills of lading, mercantile ledgers, and merchants' letters—and the physical examination of the battered ship. Although the N. N. does not mention adjudication, some charters of the Romano-Byzantine codices do. An early fifth century edict from Codex Theodosianus stated that whenever a ship carrying grain for the state foundered or was wrecked, her master was to bring the case before the judicial authorities, who would order investigators to examine the event and decide the case within two years. If the judges failed to hear and decide the case within that time frame, and if the statutory time limit should elapse, the *navicularius* (ship owner or carrier) was exonerated due to the judge's negligence. In this circumstance, the judge was compelled to pay for half of the cargo and his office staff for the remainder, provided a judicial investigation to prove the loss was sought within the statutory time limit.[109] While the above enactment set the time limit for judging the case, it did not specify the venue. Nevertheless, a sixth century edict by Justinian ordered ill-fated shipmasters, whose vessels were allegedly wrecked while carrying foodstuffs and grain for imperial distribution to appear

[109] Pharr *et al.*, *Theodosian Code*, 400, Article CTh 13.9.5, CTh 13.9.6; Sirks, *Food for Rome*, 215.

before "the judge of the province" accompanied by witnesses. Although the Justinianic edict did not indicate precisely in which province the ship owner should appear, it stands to reason that it tacitly presumed adjudication would take place in the province nearest the place where the cargo was jettisoned, the ship sank with her contents, or the port of debarkation was located.[110] By contrast, the maritime law of classical Athens decreed that the judicial hearing in cases involving disputants of different nationalities was determined not by national jurisdictions, but by the place where the commercial contract was signed.[111]

Islamic law dealt with the issue of venue more clearly than its Romano-Byzantine counterpart. It established that misunderstandings between the lessees and lessors should be adjudicated at their destination, "if the judge is reasonably just," regardless of the school of law with which he was affiliated. Otherwise, the case might be tried in any Islamic territory provided the judge was fair and just and the location accessible to all parties concerned.[112] In most major

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[110] Scott, *op. cit.*, 15:168, CJ 11.5.1: "Where a ship-master alleges that he had a wreck, he must hasten to appear before the judge of the province, who has jurisdiction, and prove the fact, by witnesses in his presence."

[111] Atkinson, "Rome and the 'Rhodian Sea-Law'," 58–59.

[112] Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:654–655; Wansharīsī, *Al-Miʿyār*, 8:304–305; Idris, "Commerce maritime," 238; *idem*, *Berbérie orientale*, 286; Goitein, "Jewish Trade," 237, TS 13 J 17, f. 11, ll. 11–14; George F. Hourani, *Arab Seafaring in the Indian Ocean in Ancient and Early Medieval Times* (Princeton: Princeton University Press, 1995), 72; Khalilieh, *Islamic Maritime Law*, 149–150; Noble, "Principles of Islamic Maritime Law," 90–92. The diplomatic and commercial relations between the Islamic Empire and the eastern countries, China and India, led to the establishment of independent Islamic law courts in major port cities. The precise date is unknown, but the third century A.H./ninth century C.E., historical sources refer to the presence of Muslim *qāḍīs* in Khānfū. Ḥamīdullāh reports: "The merchant Sulaimān reports that at Khānfū, which is the rendezvous of merchants, a Muslim is charged by the ruler of the country to adjudicate the disputes that arise between the members of the Muslim community arriving in the country. Such was the desire of the king of China. On days of festival, this chief of the Muslims conducts the service of the Muslims, pronounces the sermon and prays for the Caliph (*Sulṭān al-Muslimīn*) therein. The merchants of 'Irāq cannot rise against his decisions. And in fact he acts with justice in conformity with the *Qur'ān* and the precepts of Muslim law." See Ḥamīdullāh, *Muslim Conduct of State*, 122–123, paragraph no. 234. Similarly, Indian rulers permitted Muslim judges to preside and administer the *Sharīʿa*. The shipmaster Buzurg Ibn Shahriyār states: "If the thief is a Muslim, he is judged before the *hunarman* of the Muslims, who sentences him in accordance with Islamic law. This *hunarman* is like a *qāḍī* in a Muslim country. He can only be chosen from amongst Muslims." See Buzurg Ibn Shahriyār, *Book of the Wonders of India*, 94. While Islamic juridical authority existed in the Far East, neither Arabic nor Christian sources hint at the presence of Muslim *qāḍīs* in any major port within the Byzantine realm until

Islamic port cities along the Mediterranean, local judges, who also functioned as superintendents of the ports, settled disputes and adjudicated cases brought before them by carriers, shippers, travelers, and crewmen.[113] Judicial proceedings between the plaintiff and defendant could be instituted in any port or place—the port of loading or discharge, or the nearest port if the ship was underway, or the residence place of the defendant or plaintiff, or where the contract was formed—providing the *qāḍī* was impartial.

1. *Oral Deposition*

The use of oral deposition significantly decreased in the Byzantine period, as indicated by the fact that the N. N. refers only twice to oral testimony.[114] Nevertheless, it was crucial and valid in the absence of written documentation.[115] Where a plaintiff brought his case before the judge without written evidence, witnesses were required to substantiate his claim. Byzantine law established that the credibility of testimony did not depend only on the religious, social, political, economic status and oath of a witness. However, it exempted senators, privy councilors (*bouletes*), high-ranking government officials and bishops from the obligation to testify under oath, because they were

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the late fourteenth century, though they mention mosques founded in Constantinople during the ninth century to serve Muslim prisoners of war and merchants. Documentary sources report that Constantinople allowed a Muslim *qāḍī* to settle litigations and disputes in 1399. For further details, consult Stephen W. Reinert, "The Muslim Presence in Constantinople, 9th–15th Centuries: Some Preliminary Observations," in *Studies on the Internal Diaspora of the Byzantine Empire*, ed. by Hélène Ahrweiler and Angeliki E. Laiou (Washington D.C.: Dumbarton Oaks Research Library and Collection, 1998), 125–150. From Reinert's article one infers any dispute between Muslim merchants en route to Constantinople was most likely settled before a *Sharīʿa* court within the Islamic Empire. Dotson draws our attention to cases in Latin Europe and remarks that both parties to the shipping contract, lessee and lessor, had the right to bring the case before any judge, as they consensually saw fit, but not necessarily at the destination or port of origin. See Dotson, "Freight Rates and Shipping Practices," 76.

[113] Khalilieh, *Islamic Maritime Law*, 153.

[114] Ashburner, *op. cit.*, 83, Article III:4; 105–106, Article III:27 deals with partnership and does not relate to cases of jettison. Ashburner assumes that since this theme is well covered in the Ecloga and other Byzantine legal references, it was redundant to re-address it in the N. N.

[115] Taubenschlag, *Law of Greco-Roman Egypt*, 394–395. Egyptian legal papyri from the sixth century show that Byzantine judges repudiated the testimony of witnesses if the defendant was able to prove his allegations by documents.

assumed to be reliable witnesses.[116] Witnesses in litigations could be anyone, including women, other than slaves—except in rare cases—and the deaf, the dumb, the insane and those similarly handicapped as well as the profligate, minors under twenty [20] years of age, adulterers, or people who did not own at least fifty [50] *nomismata.*[117] Although the litigation of some legal transactions emphasized the number of witnesses, the law approved of summonses for no more than four hearings, each summons in effect for one day.[118] Ordinary witnesses appearing at the plaintiff's request were obliged to take an oath before testifying.[119] If witnesses contradicted one another or fabricated evidence, the court accepted the testimony of those it deemed worthier of credence and punished the perjurers. Either plaintiff or defendant might support his claim and challenge the other by submitting a written document signed by both parties and attested to by witnesses. The evidence of a single witness was invalid.[120]

Although slaves, servants, and freedmen were normally considered incompetent as witnesses in civil lawsuits, their oral deposition was exceptionally admitted against their masters where the latter were charged with attempting to defraud the tax authorities or embezzle public revenue.[121] One may wonder, why the testimony of a slave who served as a ship manager and exercised jurisdiction over the vessel and cargo at sea, could not be heard by Byzantine judges in cases of jettison. The Byzantine version of *lex Rhodia de jactu* did not address this enigma, but hints of the rationale for it appear elsewhere. Digest XIV, 1, 1, 4, reads:

> It makes no difference what the civil condition of such a master is, whether he is free or a slave, and whether, if he is a slave, he belongs to the owner or to another person, nor will it make any difference what his age is, as the party who appointed him has himself only to blame.[122]

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[116] Freshfield, *Manual of* Roman *Law*, 40–41.

[117] *Idem, Manual of Later Roman Law*, 127–129; Joëlle Beaucamp, "Les femmes et l'espace public à Byzance: Le cas des tribunaux," *Dumbarton Oaks Papers* 52 (1998), 129–145; James A. Brundage, "Juridical Space: Female Witnesses in Canon Law," *Dumbarton Oaks Papers* 52 (1998), 147–156.

[118] Freshfield, *Manual of Roman Law*, 98.

[119] Kazhdan *et al., Oxford Dictionary of Byzantium*, 3:1509; Freshfield, *Manual of Roman Law*, 99.

[120] Freshfield, *Manual of Later Roman Law*, 128.

[121] *Idem, Manual of Roman Law*, 40–41.

[122] Scott, *op. cit.*, 4:201.

Consistent with the nature of ship-leasing contracts, passengers and shippers were entitled to sue only the ship owner for cargo damage, since responsibility for the safety of passengers and cargo lay with the lessor, not with his employees.[123] Hence, a slave-captain and crew were not eligible to testify in civil courts. However, if the senior officers were freemen, the court would select two or three of the most experienced pilots to give evidence.[124] Justinian's legislation tended to admit three witnesses for such judicial proceedings.[125]

In an attempt to prevent legal altercations between the parties to the contract, Byzantine *juris consultes* advised passengers to deposit valuables—pearls, gems, gold, and silver carried in small chests, etc.—with the captain, so that in case of loss, he could be required to indemnify the owners. If the owner opted to hold onto his effects and not entrust them to the captain, and later claimed he lost them at sea, then the captain, crew and all those on board would have to take an oath to exonerate themselves from liability.[126] A similar ruling can be traced as far back as late eighth and early ninth century Islamic legal inquiries.[127]

The requirements for witness eligibility in Islamic courts were firmly established by the *Qur'ān*, *Ḥadīth*, and sources in jurisprudence. A witness had to have accurate first-hand knowledge, be legally capable, a free person, a Muslim if testifying against a Muslim, in full possession of his/her mental faculties, be just and fair, be above suspicion and lead a moral life. In cases concerning monetary transactions and certain contracts, two males or one male and two females were sworn in as witnesses. However, as distinct from the Byzantine practice, Islamic law required that jurists, dignitaries, statesmen, provincial governors, and even caliphs take an oath if necessary.[128]

In arguments over financial arrangements, Muslim jurists considered the lessee's testimony more credible and gave it more weight,

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[123] *Ibid.*, 4:200–205, Digest XIV, 1, 1, 1; Digest XIV, 1, 1, 3; Digest XIV, 1, 1, 22; Digest XIV, 1, 4, 2; Digest XIV, 1, 4, 3; Digest XIV, 1, 4, 4; Digest XIV, 1, 5, 1; Digest XIV, 1, 6.

[124] *Ibid.*, 15:168, CJ 11.5.3.

[125] Ashburner, *op. cit.*, xc; Letsios, *Das Seegesetz der Rhodier*, 203.

[126] Ashburner, *op. cit.*, 94, Article III:13; Letsios, *Das Seegesetz der Rhodier*, 201, 260; Leder, *Die arabische Ecloga*, 118–119, Article 28:11.

[127] Ṭāher (ed.), *op. cit.*, 34; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:87; 'Abd al-Rafī', *Muʿīn al-Ḥukkām*, 2:527.

[128] W. Heffening, "Shāhid," *The Encyclopaedia of Islam* (Leiden: E.J. Brill, 1960), 1:261–262.

except when the lessor could substantiate his claim with tangible evidence.[129] This rule applied when the cargo owners or their agents did not accompany their shipments, in which case the captain and crew could protect themselves legally by taking an oath that a bona fide emergency required the jettisoning of cargo. When the jettisoned goods consisted of insubstantial commodities, the crews did not have to present supporting evidence: the oath alone was sufficient.[130] In the absence of written evidence, the ship owner had to bring at least two witnesses to attest to the accuracy of his claim.[131] On the other hand, if lessees sued a ship owner and in court they presented a leasing contract signed by him, he could protect himself by taking an oath. Since the law did not allow a collective oath, the lessor had to swear before every individual lessee.[132] If the oral deposition was insufficient, the litigant might substantiate his claim with hearsay. Well-founded hearsay from a particularly credible source was admissible evidence: for example, when a ship had sailed in a convoy, seamen and passengers from other ships in that convoy could corroborate the captain's testimony.[133]

Maritime custom in the Mediterranean required shippers and passengers to declare to the ship's scribe their private possessions and commercial goods carried on board. The jurist Abū Zayd Ibn ʿUmar (d. 234/848) ruled out any legal claims made by the unlucky shipper who lost articles not registered in the cargo book or familiar to the seamen or other passengers. If such a claim was brought before the court but disputed by other shippers and seamen, their testimony under oath was believed. However, if they were unaware of

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[129] Ṭāher (ed.), *op. cit.*, 19, 37; Minhājī, *Jawāhir al-ʿUqūd*, 1:294; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:644; Abū al-Faḍl al-ʿĀllāmī, *ʿĀ-inī Akbarī*, 1:290; Ibn al-Mujāwir, *Ṣifat Bilād al-Yaman*, 1:138–139; Goitein, "Jewish Trade," 387, TS 13 J 17, f. 11, l. 10; *idem*, *Mediterranean Society*, 1:205–206; Udovitch, "Time, the Sea and Society," 529–530; Ben-Sasson, *op. cit.*, 226–229 [55], TS 13 J 17, f. 11, ll. 8–14. The Ḥanafite jurists affirmed that the lessee's testimony was more credible and trustworthy even if both lessor and lessee took an oath and supported their testimony with proofs. See Awzajandī, *Fatāwā Kāzī Khān*, 2:350.

[130] Wansharīsī, *Al-Miʿyār*, 8:299. Such practice prevailed in the Latin world. If the cargo owners were not on board, the decision was generally left to the captain and crew, with some texts requiring that their agreement be recorded by the ship's scribe or, in his absence, witnessed by the crew under oath. See Constable, "Problem of Jettison," 215–216.

[131] Ṭāher (ed.), *op. cit.*, 44; Saḥnūn, *Al-Mudawwana*, 4:194.

[132] Wansharīsī, *Al-Miʿyār*, 10:406.

[133] Ben-Sasson, *op. cit.*, 226–229 [55], TS 13 J 17, f. 11, l. 25: "They saw the vessels that were wrecked at sea fifteen days ago."

the nature of the lost cargo, then the sworn testimony of its owner more credible, since he was a prima facie claimant.[134] The lessee was not obliged to provide conclusive evidence or take an oath, if the truth of what he said became apparent; only in cases where his affidavit was in doubt did he have to take an oath.[135] His testimony was believed so long as it contained nothing palpably false.[136]

A general survey of North African and Andalusian Mālikī legal inquiries proves that jurists held four different legal viewpoints regarding passengers' testimony against ship owners. The first group unequivocally approved of the passengers testifying, even if the court was convened at a specific location, or if the testimony was given at different court sessions. The second sanctioned passengers' testimony regardless of the place of adjudication.[137] The third line of cases ruled that passengers' testimony should be rejected out of hand, as a result of which, in order to confirm the lessee's allegation, arbitrators had to put on neutral witnesses of good repute who were not aboard or involved in business with either the ship owner or the merchants.[138] The advocates of the fourth group of opinions advised *qāḍī*s to rely on the articles of the ship-leasing contract. Accordingly, shippers' testimony could be considered as long as each shipper individually had signed a contract with the owner of the vessel. However, if the shippers signed a collective leasing contract, their testimony would be rejected since "each person testifies for himself."[139]

If the witnesses' oral depositions were equivocal and/or the cargo consisted of basic foodstuffs and valuables, the law required magistrates to undertake more complex legal proceedings demanding a higher standard of proof. Captain and crew had to present indisputable proof—written documentation as well as depositions under oath—that the act of jettison was unavoidable.[140]

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[134] Ṭāher (ed.), *op. cit.*, 34, 37; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:87; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:527; Burzulī, *Ǧāmiʿ Masā'il al-Aḥkām*, 3:644; Wansharīsī, *Al-Miʿyār*, 8:299.

[135] Ṭāher (ed.), *op. cit.*, 37; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 239; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:87.

[136] Ṭāher (ed.), *op. cit.*, 37; Qarāfī, *Al-Dhakhīra*, 5:487.

[137] Ṭāher (ed.), *op. cit.*, 30; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 10:164.

[138] Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 10:164–165; Burhān al-Dīn Ibrāhīm Ibn ʿAlī Ibn Farḥūn, *Tabṣirat al-Ḥukkām fī Uṣūl al-Aqḍiya wa-Manāhǧ al-Aḥkām* (Cairo: Maktabat al-Kulliyyāt al-Azhariyya, 1986), 1:421.

[139] Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 10:165; Wansharīsī, *Al-Miʿyār*, 8:305.

[140] ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:528; Wansharīsī, *Al-Miʿyār*, 8:309; R. Brunschvig, "Bayyina," *The Encyclopaedia of Islam* (Leiden: E.J. Brill, 1960), 1:1150–1151: "The

2. *Written Evidence*

Ultimately, a litigant could disprove the oral testimony of witnesses if he was able to present a written leasing contract to the judge. Such a document was regarded as one of the most authentic pieces of evidence the court could consider in settling disputes between the contracting parties. By the early third century, written evidence became prevalent in Greco-Roman Egypt, so that senators could sign chartering contracts with shipmasters to convey grain from the countryside to the granaries in Alexandria on behalf of the imperial court, and then ship it to Rome and Constantinople during the sailing season.[141] By the sixth century written contracts were far more widely required. As a result, *taboullarioi* (notaries) appeared: they had a legal education, good handwriting and excellent command of Greek, and officially registered transactions and certified documents.[142] The N. N. required that contracting parties put their leasing transactions in writing, or they would be invalid.[143] Although a written contract could be regarded as conclusive evidence, oral agreements remained valid,

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burden of proof (by testimony) lies upon the one who makes the allegation and the oath belongs to him against whom the allegation is made [*al-bayyina ʿalā muddaʿī wal-yamīn ʿalā muddaʿā ʿalayhi*]." An identical ruling is found in Chapter XVI, Article 20 of the Ecloga stating: "A defendant shall not be required to testify against himself. The plaintiff must prove his case and if he fails to do so the defendant wins." See Freshfield, *Manual of Later Roman Law*, 128.

[141] Kenyon and Bell, *Greek Papyri in the British Museum*, 3:219–220, Pap. 948; Casson, *Ships and Seamanship*, 257–258.

[142] Helen Saradi-Mendelovitci, "Notes on a Prosopography of the Byzantine Notary," *Medieval Prosopography* 9 (1988), 21–49. The importance of written contracts in the Romano-Byzantine codices was dealt with at length in Digest XXIV. See Scott, *op. cit.*, 2:110–134.

[143] Ashburner, *op. cit.*, 98, Article III:20: "Where a man hires a ship, for the contract to be binding it must be in writing and subscribed by the parties, otherwise it is void." Justice's translation reads: "In hiring of ships, the charter-parties shall not be valid, except they be sealed" (Justice, *General Treatise*, 99). Letsios translates the first statement of this Article as follows: "If someone leases a ship and the agreement is sealed by both parties, then the contract is valid, otherwise it is invalid" (Letsios, *Das Seegesetz der Rhodier*, 261). The translations of Justice and Letsios seem more reasonable, especially when there is no mention of recourse to the notaries in the N. N. Therefore, at this period of time where most Byzantines were illiterate it was sufficient to conclude a contract of hire orally with the consent of the parties. Ashburner also points out that the passages pertaining to contracts in writing "are neither clear nor consistent." As a result, he infers that a contract does have to be evidenced by writing, but consent of both parties and the subscription of the charter-party are imperative to make the contract binding. See Ashburner, *op. cit.*, xc–xcii.

obligatory, and occasionally even more authentic, if the court doubted the credibility of the written document.[144]

Although the importance of written contracts was repeatedly emphasized in various sections of the N. N., as a means of preventing disputes between lessees and lessors, that collection did not provide guidelines for formulating such contracts. Nevertheless, both parties probably considered cases of jettison and thus incorporated conditions regarding the safe delivery of goods at the destination, in view of the introductory statement from Article III:20, which certainly permitted lessees and lessors to formulate contracts as they saw fit. Each party kept a copy, so that if problems arose, the judge would order them to present the original to the court.

Like the hearings established by Theodosius,[145] a proceeding in Islamic courts began with a review of the provisions of the ship-leasing contract, usually composed and formulated by notaries, and an investigation into the circumstances of the dispute. Judges would ordinarily refer to a leasing contract to determine precisely the type and volume of the jetsam. This contract generally also contained articles stipulating the type of charter (of a type of a general or a specific ship), ports of origin and destination, departure schedule, maritime route, freight charges, quality and quantity of the shipment, as well as the tackle and rigging aboard the ship.[146]

Written contracts were particularly valuable if the quantity and quality of the shipment were recorded prior to departure. In such circumstances, judges could easily calculate the amount of jettisoned cargo. The issue could become problematic, however, when a lessee hired space on board, or the entire ship, without specifying the type and actual volume of his shipment. In such a case, the judicial authorities could refer to the cargo book, which contained all relevant details of the shipment.

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[144] Evans-Jones and MacCormack, "Obligations," 135–136. One must recall that the great majority of Byzantine citizens were illiterate and casual business transactions in remote and rural areas were probably concluded orally on the basis of personal trust. The same principle held in the Muslim world.

[145] Sirks, *Food for Rome*, 204–209, 212–217.

[146] Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:447; Ibn al-Mughīth, *Al-Muqniʿ fī ʿIlm al-Shurūṭ*, 242–244; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Marrākishī, *Wathāʾiq al-Murābiṭīn wal-Muwḥḥidīn*, 470–472; Ibn Salmūn, *Al-ʿIqd al-Munzzam*, 2:3; Minhājī, *Jawāhir al-ʿUqūd*, 1:294.

The cargo book was the second most important written evidence to be scrutinized by the courts. As a rule, every medium sized and large commercial vessel had a scribe[147] who kept records of her cargo.[148] Islamic jurisprudential sources confirm the existence of the cargo book, known in the Mediterranean as *al-shāmil* or *al-sharanbal*,[149] and as *al-ruqʿa* and *al-daftar* in the Indian Ocean,[150] from the late ninth and early tenth centuries. It listed the volume, description, and current values of goods at the port of origin on the day of loading. When a question was addressed to al-Faḍl Ibn Salama (d. 319/931) about the quality and quantity of jettisoned items whose owners' testimony was inconsistent with the ship owner's oral deposition, he decreed:

> My ruling on this matter is as follows: Regarding the volume of the shipment, one should scrutinize the cargo book (*shāmil*). In our rules of evidence, it has become an authoritative document (*zahīr*), to which the people constantly refer. However, for any [claim raised by a shipper concerning] items not registered in the cargo book, there is a rebuttable presumption that the owner's statement is true if based on sworn testimony, provided that he presents evidence supporting his claim that he owned the cargo he alleges was his.[151]

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[147] Large and oversize vessels engaged in lengthy voyages took full complements of officers and crew, including the ship's scribe known in the Indian Ocean as a *karrānī*. He functioned as the accountant of the ship. His duty was to record the names of seamen and passengers, and the volume and quality of cargo in the ledger (or cargo book), and was responsible for the safety of the shipment. Occasionally, he assigned a specific person called a *bhandarī* to take charge of the stores. Thus neither seamen nor passengers were allowed to remove any personal or commercial article from the hold without the permission and presence of the scribe, who also had other responsibilities. Together with the ship owner and the captain, the scribe had to witness any agreement and commercial transaction concluded on board. A Hebrew letter describes a Jew in this position as "the treasurer and the great (commander of the ship) [*ha-gizbar ve-ha-gadol*]". See Assaf, *Texts and Studies*, 133, TS 16.54, l. 31; Ibn al-Mujāwir, *Ṣifat Bilād al-Yaman*, 1:138–139; Abū al-Faḍl al-ʿĀllāmī, *ʿĀ-inī Akbarī*, 1:289–290.

[148] Muqaddasī, *Aḥsan al-Taqāsīm*, 10; Ibn al-Mujāwir, *Ṣifat Bilād al-Yaman*, 1:138–139; Abū al-Faḍl al-ʿĀllāmı, *ʿĀ-inī Akbarī*, 1:290.

[149] Ṭāher (ed.), *op. cit.*, 37; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 229; Burzulī, *Ǧāmiʿ Masā'il al-Aḥkām*, 3:644; Idris, *Berbérie orientale*, 2:281; Gil, *op. cit.*, 2:634 [217], TS Arabic 18 (1).101, l. 12 (*al-sharanbal*); 4:21 [614], ENA NS 18, f. 35*v.*, ll. 22–23; 4:436 [745], INA D 55, f. 14*v.*, l. 20.

[150] Muqaddasī, *Aḥsan al-Taqāsīm*, 10; Ibn al-Mujāwir, *Ṣifat Bilād al-Yaman*, 1:139.

[151] Ṭāher (ed.), *op. cit.*, 37; Qarāfī, *Al-Dhakhīra*, 5:487: "Saḥnūn enunciated: His testimony is acceptable and he is not obliged to swear so long as he has not been

When a judge or an arbitrator dealt with disputes between the ship owner and merchants, he considered the cargo book one of the most reliable documents at his disposal. If a merchant proved that the ship owner did not register some of the cargo lost at sea, the latter would be obligated to indemnify the former. However, the ship owner was exempt from responsibility if passengers refuted the merchant's claim.[152] Moreover, in order to reach an unbiased decision, a judge might summon the seller from the port of origin to testify as to cargo volume and quality.[153] These legal procedures were also applied when a merchant claimed that part of the merchandise was sold or lost en route.[154] While the cargo book is frequently mentioned in Islamic historical and jurisprudential sources and documents from the Cairo Geniza as well, interestingly there is no mention of it by Byzantine jurists. In light of the absence, to date, of any historical evidence or legal mention of cargo books in the Byzantine Empire, their existence in that part of the Mediterranean remains an open question.

No less important than the written contract and cargo book to resolving disputes were bills of lading. While it was not necessarily the complete contract of carriage of goods, it was usually the best evidence of the contract. Such a declaration of receipt, which the cargo owner obtained from the carrier, contained a full description of the quantity and quality of goods received on board in apparent good order and condition, together with the names of ship owner/carrier, captain and shipper(s), port of origin and destination, and the lading and departure schedule. Shippers presented it to repudiate or ratify the claims that either party brought before a court.[155]

Speedily transmitted letters that usually reached the cargo recipient before the ship arrived at the debarkation port may have been of great legal significance. A typical express letter could contain a list of ships expected, of the merchants on board each, and a cata-

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suspected. If he claims that a large quantity of his goods was cast overboard, while the captain on the other hand denies that, he (the legal authority) should scrutinize the cargo book (*al-sharmal*), which consists of a registry of the people's cargoes on board; his testimony, after taking an oath, is approved for the quantity of cargoes written in the cargo book. . . ."

[152] Ṭāher (ed.), *op. cit.*, 34–36.

[153] Wansharīsī, *Al-Miʿyār*, 8:299.

[154] Ṭāher (ed.), *op. cit.*, 39.

[155] See above, chapter three, 85–87.

logue of all cargoes and their recipients, as well as of other merchandise that had not yet arrived.[156] The Geniza is full of such letters, but Egyptian papyri also show that merchants of the seventh and eighth centuries used to send express letters to cargo recipients at the destination, informing them about the shipments on the way. The following message, written to a high official regarding two shiploads of acacia wood, demonstrates the legal importance of such letters.

> Lo, I have loaded the 2 ships with acacia (wood) and have dispatched them this day, the 2nd of Hathor (Hatour),[157] in charge of their supercargoes that are aboard them. And here are the names of the ships and the names of the supercargoes that are aboard them and the list of villages where they were loaded; I have drawn it up for your renowned [. . .], honored lordship, at the bottom of this epistle. And see, the [. . .] that they have been brought north come on the back of this letter [. . .] for I have loaded 2 jars for distribution. I have written the [. . .] at the hand of their supercargoes that are aboard them, that my lord may know. I have written and do worship and kiss the footstool of your renowned, honored lordship. (Written?) on the 2nd of Hathor.[158]

The cargo recipients would present such a document to the court when seeking contributions for losses if part or all of the consignment was jettisoned. The judge could verify the information in the letter through oral testimony of the sender, seller, ship owner, or those who packed and loaded the shipment, and by comparing details in the letter with those in the cargo book. Although Byzantine maritime practices shed little light on this issue, it is likely that such correspondence existed in pre-Islamic Egypt. Byzantine merchants were probably aware of it, though Greek historical sources do not allude to it.

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[156] Udovitch, "Time, the Sea and Society," 529–530; Gil, *op. cit.*, 3:161–163 [354], TS K 25.250*v*; 3:245–253 [373], TS 16.163 (I); 3:310–313 [387], BM Or 5544, f. 7; 3:841–845 [556], TS 13 J 26, f. 8.

[157] Named after Hator or Hatho, goddess of love and beauty, because during this month the lands become lush and green. Gregorian Calendar equivalent: November 10th to December 9th.

[158] Crum, *Catalogue of the Coptic Manuscripts*, 158–159. A similar but shorter speedily dispatched letter appears on p. 164 of the same volume.

Finally, judges also considered mercantile bookkeeping in settling disputes between carriers and shippers. By definition, this consisted of a private record, used by merchants of the classical Geniza and their representatives, in which shippers and recipients of cargo registered their transactions. It contained reports about partners or customers, shipments received, sales and purchases made, goods or cash shipped, and balances outstanding. The basic form of this booklet could be called a seasonal report, covering the period from the arrival of the convoys of ships in the spring to their departure in the fall.[159] Mercantile records of this kind were admitted as proof both in civil and religious courts, if they were kept in the customary fashion and did not raise suspicions of fraud. When legal disputes arose between partners, merchants, or their proxies, the parties were required to present the original *daftar*[160] to the judge, either *dayyan* (Jewish judge) or *qāḍī* since its admissibility in court was considered circumstantial evidence.[161] Accordingly, it stands to reason that the *daftar* may have been used to settle arguments concerning the quantity, quality, and type of cargo jettisoned at sea, and its actual price at the port of origin.

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[159] Bodl. MS Heb. a 3, f. 13, ll. 44–46; Goitein, "Jewish Trade," 387, TS 13 J 17, f. 11, l. 10; *idem*, *Mediterranean Society*, 1:205–207. The popular format of such a *daftar* was only 3 to 4 inches wide. There was a short type (5.5 to 6 inches) and a longer one (7.5 to 11 inches). The narrow format arose from the custom of carrying one's account book in one's sleeve, to have it at hand if needed.

[160] Terminology varies in times and places. Muqaddasī, for instance, referred to the *daftar* as a cargo book, whereas the Geniza merchants referred to it as a mercantile bookkeeping.

[161] TS 10 J 29, f. 5, ll. 16–19. The document deals with a claim brought before the *bēth dīn* [law court] against the representative of merchants in Ramle. Before the judge, the plaintiff and the defendant agreed that the latter should go down to that city to verify the facts from his *daftar* [*wa-ittafaqnā ʿalā annahu yanzil al-Ramla yakshif daftarahu . . . wa-naḥḍur fī majlis av bēth dīn*]. See also Ben-Sasson, *op. cit.*, 226–229 [55], TS 13 J 17, f. 11, ll. 8–14. This letter proves that Muslim *qāḍīs* also considered the *daftar* as substantial evidence. In a complaint brought before the *qāḍī* of Qayrawān, ʿAbd al-Raḥmān Ibn Muḥammad Ibn ʿAbd Allāh Ibn Hāshim (in office between 1006 and 1036), he required the *commenda* dealer [*al-maqrūḍ*] to present the *daftar* to the court. To substantiate all commercial transactions and details registered there, the *qāḍī* sent inspectors to the port to assess the quality and quantity of the cargo in the ship's hold [*zahara ʿalayhi {markab} al-raḥl wa-rufiʿa lil-Qayrawān li-ʿAbd Ibn Hāshim al-Qāḍī*]. This leaves no doubt that classical Geniza merchants may have used the *daftar* when they calculated the value of jetsam.

3. *Physical Examination of the Ship*

Final tangible evidence came from a physical examination of the ship's hull. Both Byzantine and Islamic custom and law required at least two notaries of good repute and well versed with nautical technology and ships' defects to examine the extent of structural damage to a vessel.[162] From such an examination the magistrate could assess whether the physical evidence was compatible with the captain's account of the emergency.[163] If the vessel was damaged, the judge was to appoint two experts in nautical crafts and shipbuilding to examine her physical condition and calculate the actual price of the damaged vessel before sending it for repairs.[164] If the magistrate determined that the captain's decision to jettison was unjustified, he could order the captain to reimburse the owners of the jettisoned cargo in full.[165]

Summary

The lawyers of ancient Rhodes were among the earliest Mediterranean jurists to incorporate laws of general average in their statutory codices. Later, Roman jurists not only recognized and embodied them as *lex Rhodia de jactu* (Digest XIV, 2, 9), but also promulgated them among other peoples who came under Roman rule. When Muslims emerged as a naval and commercial power in the Mediterranean, their jurists, as well as those involved in the shipping business, recognized some of the fundamental principles in the Digest and the N. N. A general survey of the Romano-Byzantine and Islamic legal literature reveals that both systems shared at least two requirements in order for the general average to apply to losses at sea: (a) a common peril must be imminent, *i.e.* the craft herself, cargo, freight,

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[162] Pharr *et al.*, *Theodosian Code*, 400, CTh 13.9.6; Scott, *op. cit.*, 15:168, CJ 11.5.3; Kindī, *Al-Muṣannaf*, 21:153–154; Ibn Bassām, *Nihāyat al-Rutba*, 148, 157.

[163] Wansharīsī, *Al-Miʿyār*, 8:309–310; Ṭūsī, *Al-Nihāya*, 447–449; Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 8:31–33; Ḥillī, *Al-Sarāʾir*, 2:470; Muḥaqqiq al-Thānī, *Jāmiʿ al-Maqāṣid*, 7:298.

[164] Ṭāher (ed.), *op. cit.*, 45–46; Kindī, *Al-Muṣannaf*, 21:153–154.

[165] Ibn Bassām, *Nihāyat al-Rutba*, 148, 157.

and humans—crew, shippers, and passengers—must be at risk; and (b) a sacrifice must be made voluntarily and in good faith for the common interest, to avert an immediate danger from threatening the entire voyage.

Byzantine and Islamic laws both required advance consultation among the crew and shippers prior to the act of jettison, if time permitted. Both bodies of law confirmed that the heaviest goods were to be jettisoned first as long as they could be reached, regardless of their value. The major differences between Byzantine and Islamic maritime jettison practices related to the inclusion or exclusion in the evaluation of losses of the personal effects, the ship, and the wages of seamen. According to Byzantine law, ordinary passengers, shippers, and all on board shared the risk of loss and possible forfeiture, regardless of whether the items and capital they carried with them were intended for commerce or personal use. By contrast, the great majority of Muslim jurists excluded personal effects from being averaged.

Byzantine law assessed jetsam in accordance with the price it would have fetched at the port of debarkation. However, this issue remained controversial among Muslim scholars, who generated four distinct rules regarding the venue in which the loss of cargo was to be assessed: at its place of origin, at the port of loading and embarkation, at the port nearest to the jettison, or at the destination. The great majority of jurists were inclined to assess the goods on the basis of current value at the port of origin on the day of sailing. Neither the Digest nor the N. N. referred to the inclusion or exclusion of the port charges and customs duties in calculating general average. Muslim jurists, however, ruled that port dues and customs payable by the lessors and lessees could not be included in the calculation, since as Islamic law sees them as non-refundable official prerogatives, once they have been paid.

The legal status of the ship remained in debate among the Digest's lawyers, while their Rhodian counterparts unanimously included her when assessing the value of the jetsam and intact goods. A general survey of the Justinianic Corpus Juris Civilis reveals that one group did not grant contribution to the ship's owner in the event the rigging and tackle were jettisoned. Another group exempted those fortunate merchants who could save their own shipments from contribution to the ship owner or to unlucky fellow passengers if the vessel and

others' cargo were lost. A third group, on the other hand, included the ship and her gear in the general average contribution in cases of jettison. Identical rulings prevailed in the Muslim world. The major difference between the Digest and Islamic jurisprudence, however, lay in valuating the ship. The former based estimates on her current condition and cost at the port of destination, while the latter based estimates on her cost at the homeport.

Muslim jurists undoubtedly addressed the issue of human jettison more comprehensively than did Romano-Byzantine lawyers. The common denominator between the two laws was the distinction between slaves acquired for commercial purposes, and those purchased for domestic service. In the first instance, slaves could be thrown overboard in time of peril. However, those providing service, when members of the crew, could not be jettisoned because, as her operators, their role was to bring the ship and her remaining contents safely into port. Furthermore, while the Digest forbade the jettison of freeborn passengers, some Muslim jurists permitted it, if they were chosen by lot. Ibn al-Jahm forbade sacrificing any human being for the sake of others due to the tacit prohibition of Islamic law; slaves, therefore, were not to be averaged. Advocates of this rule argued that, since the law did not discriminate between humans, implementing the rule upon slaves meant subjecting free people to it as well. A third line of cases distinguished between those slaves purchased for commerce and those purchased for private service. A slave bought as a private possession was excluded from general average contribution. Generally, slaves who served on the ship were not subject to contribution unless otherwise specified. When a ship owner bought slaves to trade them, however, their value had to be taken into consideration in the assessment of contribution for the jettisoned merchandise. Furthermore, unlike Byzantine practices, which fixed the amount of two *mina*s for a slave purchased for commerce and three *mina*s if purchased for domestic services, Islamic law estimated the slave's value on the basis of ethnicity, age, gender, and physical ability.

Byzantine and Islamic legal authorities employed similar judicial procedures to settle litigation and claims between the lessees and lessors. Where written documents such as leasing contracts, cargo books, bills of lading, business correspondence and mercantile ledgers were available, the litigant could introduce them as proof of his

claims. In the absence of written documentations, the claimants and/or defendants could testify before the court after producing witnesses and taking an oath. Judges could also call on experts in the maritime industry to examine the wrecked vessel and verify or reject the lessor's allegations.

CHAPTER FIVE

COLLISION

General

Collision was one of the most feared catastrophes a mariner, shipper, or passenger could experience on board a ship whether at the port of origin, en route, or at the destination. When ships collided, ran aground, or hit a shore structure, not only property damage but personal injury or even death could ensue. Collision was not considered a problem per se, but rather one concerning the liabilities that owners of the colliding ships were to assume. As a result, to succeed in an action in tort for damages arising from collision, judicial authorities, assisted by experts in maritime industry had to determine the precise chain of causation that produced the collision in order to determine whether it occurred due to a navigational misconduct of the crew of either or both vessels, *i.e.*, was one vessel solely to blame, and to what degree. This required them to determine also whether natural factors beyond human control, like bad weather and rough seas, had come into play, in which case it could be an unavoidable accident where neither vessel was at fault, or whether the collision resulted from intentional malice by a particular culprit. Once the judges considered the circumstances of a particular case, they were able to fix the nature of the losses and the expenses incurred.

Navigational Misconduct

The oldest written collision laws, from the dawn of ancient civilizations, are attributed to Hammurabi in the first half of the second millennium B.C. His 240th Code discusses the liability of the owners of two ships in the event of a collision between a ship in motion and one at anchor, in which one boat was sunk:

> If a boat runs against another boat at anchor and sinks it, the owner of the sunken boat shall declare before God [in open court] the extent of his loss; the owner of the boat which ran down the one at anchor shall make reparation for the boat and all that was lost.[1]

The code is of great importance, because its laws regarding collision regulations instituted four millennia ago have remained in force to this day. The ship owner employed the mariners on board and in charge of the ship, and was liable for their professional misconduct and negligence. A suit could be brought against the actual owner rather than the employees if they served on board within their employment terms, and provided the collision did not result from their willful, malicious, and criminal acts, or if the ship has been chartered by demise, in which case the liability was attached to the charterer only. While a negligent owner was responsible for the loss of sunken ship, a charterer who leased a vessel by demise ordinarily bore responsibility for losses and repair to an unsalvageable vessel, or paid a sum comparable to the value of the vessel and her contents if these were lost at sea, providing that sunken ship's owner presented the exact amount of his loss to the court. However, where the vessel was salvageable, the negligent party had to pay the cost of salvage, including costs of retrieving and storing the cargo, as well as carrying out the repairs to the vessel. This compensation was determined in accordance with guidelines drawn up in section 238 of the Codes of Hammurabi: "If the sailor has let the man's ship founder, but then has raised it, he shall give half its price in silver (to its owner)."[2] The law fixed in advance the remuneration for salvage services and bound the delinquent party to make good on the damage in full, either by providing an identical substitute ship or paying the value of the sunken craft. If the wrecked ship was salvaged, the owner of the colliding vessel had to pay half of her value and an equivalent amount for the ruined cargo.[3]

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[1] Davies, "Code of Hammurabi," 435. Another translation reads: "If a ship (under the command) of the master of a galley has rammed and so has sunk a (sailing) ship under (the command of) a master sailor, the owner of the ship whose ship is sunk shall formally declare anything that has been lost in his ship and the master of the galley which has sunk the (sailing) ship (under command) of the master sailor shall replace his ship and whatever he has lost for him." See Driver and Miles, *Babylonian Laws*, 2:85.

[2] Driver and Miles, *Babylonian Laws*, 2:85; Davies, "Code of Hammurabi," 435.

[3] Driver and Miles, *Babylonian Laws*, 1:431–432.

Despite the antiquity of Hammurabi's collision codes, they have been continuously applied throughout history. Over a millennium and a half later, Roman legists not only preserved Hammurabi's collision regulations, but also commented on and expanded them. Ulpianus (c. 170–228 C.E.) states:

> If your ship collides with my boat and I am damaged, the question arises what action shall I be entitled to? Proculus says that if it was in the power of the sailors to prevent the accident, and it occurred through their negligence, an action can be brought against them under the *Lex Aquilia*, because it makes but little difference whether you cause damage by driving the ship at the boat, or by steering towards the ship, or inflict the injury with your own hands.[4]

Obviously, the legist refers here to carelessness and negligence in navigation on the part of the captain and his crew. Crews were obligated to observe the collision regulations and exercise their utmost efforts and skills to prevent the ship from doing damage. If a collision was attributed to a specific vessel, then liability to compensate for damages and losses to the vessel that suffered was attached to the responsible ship; no claims could be made against the owner of the colliding vessel. The Digest held the *culpa*[5] accountable and ordered him to pay indemnity for loss or damage sustained by the other ship once it was established that the accident could have been avoided had his seamen not neglected their duty.[6] This left the main issue—whether the ship owner, captain or actual wrongdoer was liable for the collision damage—unresolved. Digest IX, 2, 29, 4 provided a relevant though somewhat ambiguous answer: "If one ship collides with another approaching in the opposite direction, an action on the ground of wrongful damage will lie either against the steersman or the captain." It is reasonable to infer that in the absence of fault on the captain's part, the steersman would normally be held liable. However, if the steersman navigated the ship according to the

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[4] Scott, *Civil Law*, 3:336, Digest IX, 2, 29, 2.

[5] *Culpa* literally means a faulty judgment, negligence, or error. In nautical terms, it signifies a navigational misguidance, on the part of either or both pilots of the vessels, which could occur in the port and/or while sailing, be it at night or in broad daylight.

[6] Scott, *op. cit.*, 3:337, Digest IX, 2, 29, 2 and Digest IX, 2, 29, 4; Gormley, "Development of the Rhodian-Roman Maritime law," 327; Ashburner, *Rhodian Sea Law*, cclxxxv.

captain's instructions, a claim would be brought against the latter. A ship owner could probably be held responsible for collision damages if he failed to recruit skillful seamen[7] and/or provided an unseaworthy vessel, or if he was personally engaged in managing and navigating his own craft.

The N. N. treated cases of collision in Article III: 36 only, which ruled that if a ship at sail collided with an anchored vessel or one that had slackened sail in the daytime, all damage would be paid by the captain and those on board; cargoes aboard the colliding vessel were also subject to contribution.[8] Why the shippers and passengers on board the injuring vessel were held accountable for loss or damage arising from navigation errors of the colliding ship's staff is unclear. Justice assumes that the Rhodian legislators imposed contribution upon shippers and passengers to move them "by the powerful motive of their own interest, to do their utmost endeavor to prevent all sorts of unhappy accidents."[9] However, Justice's explanation makes no sense unless the merchants owned the craft, or they collaborated with the shipmaster and mariners by agreeing to sail under adverse navigational conditions, or they alternatively chartered her by demise, *i.e.* they personally hired and ran the ship, engaged her crew, and assumed command of her. Damages caused by a willful act of the master or the negligence of a pilot whom the shippers employed, would make the merchants aboard the injuring vessel solely to blame. The ruling of the Rhodian legists may have been applicable in such a case. It also stands to reason that shippers would be held accountable because of their engagement in the venture. Thus, just as they were to be consulted before jettison, they presumably would be involved in navigational decisions resulting in collision.

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[7] Scott, *op. cit.*, 4:201, Digest XIV, 1, 1, 5.

[8] Ashburner, *op. cit.*, 110; Freshfield, *Manual of Later Roman Law*, 203; Lobingier, "Maritime Law of Rome," 29; Gormley, "Development of the Rhodian-Roman Maritime law," 327–328; Dareste, "*Lex Rhodia*," 23; Pardessus, *Lois maritimes*, 1:253–254; Justice, *General Treatise*, 107–108; Letsios, *Das Seegesetz der Rhodier*, 179–180, 264. A similar enactment is found in the thirteenth century Islamic treatise on the law of the sea from the Indian Ocean, with reference to ships sailing in convoy. It obliges the colliding ship to make good two-thirds of the impacted ship's loss if the collision occurred at night or in storm conditions. But in a daytime collision, the captain had to refund the losses in full. See Winstedt and de Josselin, "Maritime Laws of Malacca," 54.

[9] Justice, *General Treatise*, 108.

Muslim jurists of all denominations retained the collision regulations instituted in the Digest but also introduced new ones. Their rulings distinguished clearly between collisions involving an anchored ship and one at sail. "Rules of the road" were in force on Islamic ports, rivers, and inland waterways in allocating collision liability. One common reason for a collision in port was the failure (*tafrīṭ*)[10] to maintain a proper lookout. When a ship under sail struck another one at anchor, the damage would have to be appraised and paid by the colliding vessel, if negligence on her part was confirmed. Ibn Qudāma (541–620/1146–1223) referred to the latter as the *qayyim*, not necessarily signifying the vessel owner only, but also her operator.[11] In fact, liability for damage to the injured vessel with her contents lay primarily upon the captain, who was sometimes also the ship master in charge of recruiting skilled crew.

Another possible cause of collision could be failure to navigate skillfully. A common type of collision involved ships sailing upstream and downstream on a river. Liability for the forfeitures was, with few exceptions, assumed by the shipmaster sailing downstream. He paid the entire expense of the loss of cargo and physical injury to a ship sailing upstream. The chief exception to this general rule applied when the captain of an upstream vessel was delinquent, in which case he had to remunerate the owner and shippers of the injured craft sailing downstream. When two ships struck one another while sailing in the same direction due their masters' negligence, however, each party was responsible for the damage incurred by the other. A different legal opinion required, when both vessels were equally to blame, that the damages be divided and shared equally by the two ships. This approach resulted from the requirement that each party had to pay the other half the damage he sustained. For example, if *A* collided with *B, A* would have to bear the liability for half of his own losses and also half of *B*'s losses, and vice versa; the cost of damages was divided equally between the vessels involved

[10] Ibn Qudāma, *Al-Mughnī*, 12:548–550; Nawawī, *Rawḍat al-Ṭālibīn*, 7:188–190; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 123.

[11] Ibn Qudāma, *Al-Mughnī*, 12:548; Ibn al-Mundhir al-Nīsābūrī, *Al-Ishrāf*, 2:184; Ibn Fāyi', *Aḥkām al-Baḥr*, 390. The *mufarriṭ* (negligent party) in Islamic law applied not only to a shipmaster who cannot control his vessel and avoid the accident, but also to the individual who failed to recruit professional seamen and provide the apparatus and rigging necessary for safe navigation.

and each vessel had to bear one-half of the total damages of both when there was any fault in each vessel's part. In all situations, the masters of the ships involved were required to corroborate their claims.[12]

Byzantine and Islamic maritime laws alike exempted the colliding vessel from compensating the owner of the injured one if the latter was delinquent. As a precaution, the shipmaster had to secure his anchored craft to the dock and light the appropriate sections of the ship or assign a watchman to warn other ships approaching or anchoring next to her after sunset. If the shipmaster, neglecting his duty, overlooked these safety regulations, his vessel was wrecked while anchored, and witnesses substantiated the facts, her owner was the only person to blame. The owner of the moving ship was not liable if he was not notified of an anchored ship nearby and he skillfully navigated his craft or assigned watchmen to monitor the movement of the ship in the port. In such a case, the collider was entitled to seek compensation for the physical injury to his ship and her contents.[13]

Entering the port and docking in the proper place was extremely hazardous for an unskilled pilot or an unseaworthy craft. Legal inquiries often referred to ships running aground due to a careless crew or bad weather. If the damages to the ship resulted from misguidance and negligence on the seamen's part, the ship owner would have to compensate his shippers for their losses. Where part of the goods and the ship were damaged due to an act of God, the vessel and her remaining shipments would be averaged.[14] Although reports

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[12] Shāfiʿī, *Al-Umm*, 6:86; Saḥnūn, *Al-Mudawwana*, 4:492–493; Ibn al-Mundhir al-Nīsābūrī, *Al-Ishrāf*, 2:183–184; Ghazālī, *Al-Wajīz*, 2:150; Ibn Juzayy, *Al-Qawānīn al-Fiqhiyya*, 337; Ibn Qudāma, *Al-Mughnī*, 12:549; Nawawī, *Rawḍat al-Ṭālibīn*, 7:188; Bayḍāwī, *Al-Ghāya al-Quṣwā*, 1:901; Wansharīsī, *ʿUddat al-Burūq*, 629–630; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 390–393; Noble, "Principles of Islamic Maritime Law," 170–172, 175–176. Is it possible to assume that Muslim jurists set up precedents awarding damages based on the percentage of fault of each vessel? A relevant answer requires us to re-investigate the subject and compare the Islamic laws on collision with their medieval European counterparts. The Digest, dealing with river navigation under different headings, alluded indirectly to accidents on rivers but was still much less informative than the rulings established in Islamic jurisprudence. See Scott, *op. cit.*, 3:337, Digest IX, 2, 29, 4.

[13] Ashburner, *op. cit.*, 110; Freshfield, *Manual of Later Roman Law*, 203; Lobingier, "Maritime Law of Rome," 29; Gormley, "Development of the Rhodian-Roman Maritime law," 327–328; Ibn Qudāma, *Al-Mughnī*, 12:550; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 124.

[14] Ṭāher (ed.), *Akriyat al-Sufun*, 36; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 235; Qarāfī,

of ships hitting shore structures are rare, it is reasonable to surmise that the ship's master or owner would have had to pay for damages to port installations caused by the seamen's navigational negligence. Little wonder, then, that major Islamic ports had their pilots navigate incoming vessels to their terminals to avoid collisions.[15] Once the vessel's captain or owner gave over command to the harbor pilot, he himself was immune from liability for collision damages or injuries.

Inevitable Collision

The collider was granted legal immunity when the injured party was delinquent, as noted above, or if a *force majeure* caused the accident, so that neither was to blame. The master of the injured vessel could not press a claim for remuneration if the captain and crew of the colliding ship, under oath, could establish beyond a reasonable doubt that the collision was unintentional and unavoidable. The burden of proof lay on the shipmaster and crew of the colliding vessel, who had to prove that they exercised the utmost effort to prevent the collision. In the event of dubious attestation, the collider had to pay compensation in full.[16] Moreover, if adverse winds and high waves loosened a ship properly fastened to the shore so that she collided with and wrecked a neighboring craft, her owner was immune from liability, as the injury did not result from his delinquency. But, if neither vessel was to blame and the accident was proved unavoidable, each party would bear the loss incurred to her own vessel and freight.[17] Both the Justinianic Digest and Islamic law allowed a ship's master to cut the cable of another ship being driven against his own, if he could not escape damage otherwise.[18]

Al-Dhakhīra, 5:487; *idem, Al-Furūq*, 4:10; Wansharīsī, *Al-Miʿyār*, 8:306; Nuwayrī, *Al-Ilmām*, 2:244; Ibn Qudāma, *Al-Mughnī*, 12:551.

[15] Tibbetts, *Arab Navigation*, 60–61.

[16] Scott, *op. cit.*, 3:337, Digest IX, 2, 29, 4; Ibn Qudāma, *Al-Mughnī*, 12:549; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 128–129; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 386–389; Noble, "Principles of Islamic Maritime Law," 176–179.

[17] Scott, *op. cit.*, 3:337, Digest IX, 2, 29, 4; Shāfiʿī, *Al-Umm*, 6:86; Ibn al-Mundhir al-Nīsābūrī, *Al-Ishrāf*, 2:184; Ibn Qudāma, *Al-Mughnī*, 12:549.

[18] Scott, *op. cit.*, 3:336, Digest IX, 2, 29, 3: "Where a ship is impelled by the force of the wind against cables attached to the anchors of another ship, and the sailors cut the cables; and the ship cannot be extricated in any other way but by

Intentional Collision

With reference to maritime collision, the Greek word *dolus*[19] signifies a deliberately performed unlawful act by a master of a ship or an evildoer with the malicious intent of wrecking or sinking another craft and/or capturing her contents. The culprit was obliged to compensate the ill-fated ship owner and shippers, if the damaged vessel carried cargo, and to pay the wergild (blood-money) for the drowned seamen and passengers. Both shipmasters bore responsibility for the damage to the ships and goods if it was proved that they intentionally struck each other. When the collision was fatal, the culprits jointly paid the wergild to the victims' heirs. If either culprit lost his life, the other had to pay half the wergild to the deceased's family, and if both died, their families had to pay each other half the wergild.[20]

As well as addressing collision cases between ships, the Digest ruled as to premeditated damages against anchored ships, where the culprit purposely untied a secured vessel or damaged the bottom of a ship. Digest IX, 2, 29, 5 ruled that "where anyone cuts a cable by which a vessel is secured, and the vessel is lost in consequence, an action in *factum* will lie."[21] Although the N. N. overlooked such a scenario, Muslim jurists addressed it and expressed a judicial opinion similar to Digest IX, 2, 29, 5. A twelfth century edict by Ibn

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cutting the cables, no action should be granted." An identical principle seems to have been adopted by early Muslim jurists. See Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 15:447–448; Khalilieh, *Islamic Maritime Law*, 156; Ibn al-Jallāb, *Tafrīʿ*, 2:295–296; Ṭāher (ed.), *op. cit.*, 51: "If a vessel was tied to another and then a wind arose and one of the vessels was released for fear of sinking, and the untied vessel foundered, he who untied it is absolved of liability."

[19] *Dolus*: Guilty intention, or malice; or, behavior that relies on deception to achieve its purpose, trickery, treachery cunning. See Henry Liddell and Robert Scott, *A Greak-English Lexicon* (Oxford: The Clarendon Press, 1968), 443; P.G.W. Glare, *Oxford Latin Dictionary* (Oxford: The Clarendon Press, 1982), 570; Ashburner, *op. cit.*, cclxxxv; Gormley, "Development of the Rhodian-Roman Maritime law," 327.

[20] Shāfiʿī, *Al-Umm*, 6:86; Ibn al-Mundhir al-Nīsābūrī, *Al-Ishrāf*, 2:184; Ibn Qudāma, *Al-Mughnī*, 12:548–549; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 121–122; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 381–384, 394; Noble, "Principles of Islamic Maritime Law," 180–185. A similar enactment is found in the Digest. Proculus decrees: "It makes but little difference whether you cause damage by driving the ship at the boat, or by steering towards the ship, or inflict the injury with your own hands; as in all these ways I sustain damage through your agency." See Scott, *op. cit.*, 3:336, Digest IX, 2, 29, 2.

[21] Scott, *op. cit.*, 3:337.

Qudāma ruled: "If some person deliberately or accidentally loosened the ship's hawser at the loading berth and the ship sank with her contents, he is obliged to indemnify the parties concerned for all losses."[22] In like manner, any person who damaged the hull with fatal consequences and fiscal losses had to indemnify the injured parties. If the damage was caused deliberately, the culprit was punished and had to pay wergild. When a culprit intentionally damaged the hull but did not wreck or sink the ship, the act was categorized as a semi-intentional accident, similar to the case of a seaman who intended to carry out a repair but pierced the hull with his tools and caused the craft to sink. If the shipwright/caulker accidentally or unknowingly did not repair the right place, or if a stone from the ballast fell from his hand and holed the ship, the error fell within the category of an accident.[23] In all circumstances, an investigation was required to determine whether the damage was accidental, semi-intentional, or intentional, as fiscal compensation and punishment differed in each case.

Summary

The Digest held the steersman or the captain solely accountable for the damage.[24] By contrast, the N. N., as stated earlier, placed liability upon all parties on board the colliding vessel, if it was established with certainty that the accident took place between a ship at sail and another at anchor during the day, by reason of professional delinquency of the seamen of the injuring ship. However, why the ordinary passengers and shippers had to contribute to the loss suffered by the other craft remains unexplained and unanswerable. Nevertheless, the N. N. justifiably disregarded the consequences to the negligent party even, if fatal, and states: "If the sailor was negligent and the watchman dozed off, the man who was sailing perished as if he ran on shallows and let him keep harmless him whom he strikes."[25] That is, if the delinquent individual on the colliding ship, whether the

[22] Ibn Qudāma, *Al-Mughnī*, 7:432.
[23] Nawawī, *Rawḍat al-Ṭālibīn*, 7:190.
[24] Scott, *op. cit.*, 3:337, Digest IX, 2, 29, 4; 5:81, Digest XIX, 2, 13, 2.
[25] Ashburner, *op. cit.*, cclxxxv, 110; Dareste, "*Lex Rhodia*," 23; Pardessus, *Lois maritimes*, 1:253–254; Justice, *General Treatise*, 107–108.

captain or the watchman, was physically injured or died, indemnity had to be paid by him personally—or by his heirs if he died—for the losses incurred by the damaged ship.[26] As for imposing contribution on shippers, this could be applicable logically if they were responsible for running the ship.

In general, Islamic law imposed *ḍamān* (liability) on the respective overseers of the two colliding ships if they were both negligent. In other words, if they owned both ships and contents, they jointly and proportionately shared the losses and the costs of the damage to both vessels, and each party received his share. If the overseers were employees, they were liable for damages and losses, but not jointly in proportion to the damage to both vessels. If freemen perished on both ships, and, if the collision was intentional and fatal, both ships' overseers were responsible and they were penalized. If the victims were slaves, then the overseers of both ships, if they were freemen, were exempt from penalty. If the collision was neither intentional nor life-threatening, the overseers had to pay wergild to the families of the free victims, and the value of the slaves to their owners. But, if both captains happened to be slaves, liability attached to them. If the passengers and seamen of both ships drowned, their reciprocal liability was annulled. If the collision was unintentional, neither party was held responsible. If there were deposits and commercial merchandise on both ships, these were not guaranteed so long as the overseer was not negligent and did not transgress. If both ships were leased, they had to be considered as a trust and were not subject to contribution. If both captains were carrying money to another country, they were not liable for the losses, if it was established with certainty that the collision was unavoidable.[27]

The legal collections presented here differed mainly in reference to liability. Responsibility for loss or damage was not upon the ship owners only, but also upon shippers and the ships' overseers—the captains and senior officers. If both were found negligent or guilty of intentional transgression, the overseers of the colliding ships had to pay compensation for the damage to the ships and cargoes, wergild to the families of free victims, and the value of the lost slaves to their owners.

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[26] Freshfield, *Manual of Later Roman Law*, 203.

[27] Ibn Qudāma, *Al-Mughnī*, 12:549–550; Ibn al-Mundhir al-Nīsābūrī, *Al-Ishrāf*, 2:184; Noble, "Principles of Islamic Maritime Law," 170, 175–177.

CHAPTER SIX

SALVAGE, SALVORS AND SHIPPERS

General

The term "salvage" applies to the service performed by a salvor and the obligation to remunerate him for successful services. The formal principles of a valid salvage claim are: (a) the object of the salvage must be at risk of loss, destruction or deterioration on navigable waters; (b) the service must be successful completely or in part; and (c) the salvage service must be voluntary.[1]

The law of maritime salvage has a long history. Ever since shippers first hazarded their ships upon rivers and seas, it was public policy to encourage and reward those willing to save property that was stranded, submerged or otherwise in peril of loss or damage.[2] Byzantine and Islamic legal codices point out two elements within the rules governing marine salvage: (a) the personal element, *i.e.* rescuing life and (b) the economic element, namely ships and their apparatus, wrecks, cargoes and their accessories.

Life Salvage

Travel accounts, case histories and other documentary evidence from the Christian and Muslim worlds establish that it was prevalent in the Mediterranean Sea in ancient and medieval times to save passengers' lives at sea. This explains why Byzantine and Islamic judicial codices, *dicta*, and *responsa* include specific references to the subject of human rescue. The principle of life salvage was based on actual, immediate danger, or at least a substantial apprehension of danger

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[1] Schoenbaum, *Admiralty and Maritime Law*, 782–785.

[2] On the right to salvage properties from wreck in biblical and Hellenic codified laws and customs, see Tamuz, "Aspects of the Affinity to the Sea," 109–110; Pardessus, *Lois maritimes*, 1:48; Frank J. Frost, "Scyllias: Diving in Antiquity," *Greece and Rome* 15 (1968), 184; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 147–148.

to the persons whose lives were saved. The question the Byzantine legists addressed was not whether rendering assistance to save human lives was compulsory or optional, but whether compensation was due a rescuer. Article III:30 of the N. N. ordered either a shipper or a passenger, if he was saved without clinging to any of the ship's equipment, to pay a reward of half of the value of his freight, as well as a tenth of the value of his gold, and a fifth of his remaining gold if he escaped drowning by clinging to any of the ship's spars.[3]

Article III:30 applied both to a ship sailing in convoy and by cabotage. In either case, an unlucky shipper or a passenger could be saved by other vessels or by swimming ashore after he was brought closer to his ultimate destination. Hence, the survivor had to pay his fare for being taken part of the distance to his port of destination, besides a tenth of his salvaged gold. The second part of the same charter might have referred to the total loss of a ship and stipulating that a survivor who could save himself by using any tool belonging to the doomed ship had to pay a fifth of his remaining money. Freemen and slaves in danger of perishing at sea were thus assessable in monetary terms. Although the N. N. did not explicitly mention the compensation due to foreign salvors sailing on other vessels for rendering assistance to human lives in peril at sea, it stands to reason that they were entitled to an equitable share of the reward set forth in Article III:30.

Whereas the A. S. briefly alludes to the saving of human lives, other Islamic legal inquiries discuss the issue at great length. The jurists' debate revolves around the legality and illegality of rewarding salvors for rescuing human lives. The great majority of the *fuqahā'* tended to dismiss any obligation to compensate a salvor for services subsumed within moral duties that should be rendered free of charge. Assisting persons in distress at sea was mandatory as long as the rescuers did not compromise their own safety. If the salvaging vessel had sufficient space to carry survivors, the captain and his crew were penalized if they ignored a distress call. Abandoning survivors on the high seas was permissible, however, if it would jeopardize the

[3] Iohannis Spatharakis, "The Text of Chapter 30 of the Lex Rhodia Nautica," *Hellenika* 26 (1973), 207–215; Dareste, "*Lex Rhodia*," 21; Ashburner, *Rhodian Sea Law*, 107; Pardessus, *Lois maritimes*, 1:252; Justice, *General Treatise*, 104; Freshfield, *Manual of Later Roman Law*, 202; Letsios, *Das Seegesetz der Rhodier*, 263.

rescuers.[4] Prohibiting pecuniary rewards to rescuers stemmed from the religious belief that rescuing travelers and mariners in peril on the sea was a religious obligation and a moral duty.[5] As for the legal status of those saved from drowning and found on Islamic shores, the law dictated that if their identities were known, the rescuer had no legal right to enslave them or take them prisoner. However, if the identity of the rescued persons remained unknown by the end of a lunar year (355 days), the rescuer could do either.[6]

Assisting in the rescue of human lives was mandatory in Romano-Byzantine and Islamic laws as long as it did not put the rescuers or the rescuing vessel at risk. Rescued free passengers owed nothing for their persons because a freeman, under the Digest charters and Islamic law, was without price.[7] Slaves, however, especially those purchased for commercial purposes, were seen by jurists and hence by salvors as live-property salvage. Therefore, it was a moral duty to rescue imperiled slaves, but a reward was expected from their owners. Slaves were treated as human cargo and evaluated on the basis of their market value when owners and salvors computed the awards due.

Property Subject to Salvage

Judicial debate focused greater attention on the legal status of salvaged commercial goods, personal effects and ships. The rules propounded in the Digest, N. N. and Islamic jurisprudence differentiated between property from a shipwreck found floating on the sea surface,

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[4] Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 10:164–165; 15:447–448; 16:76–77; Ibn Ḥazm, *Al-Muḥallā*, 7:27; Qarāfī, *Al-Furūq*, 4:11; *idem*, *Al-Dhakhīra*, 9:92–93; Kindī, *Al-Muṣannaf*, 18:62; Burzulī, *Ǧāmiʿ Masā'il al-Aḥkām*, 5:310–311; Khalilieh, *Islamic Maritime Law*, 155–156; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 552–554.

[5] By contrast, Islamic legal and civil authorities in the Indian Archipelago authorized the rescuer of human lives to determine the compensation due within the limits of law. Maritime regulations in the Islamic countries of the Indian Archipelago entitled the rescuer to collect the fare from a free passenger when he arrived in port, and for a slave, half of his value. However, rescuers could not enslave human beings without permission of the port superintendent. See Raffles, "Maritime Code of the Malays," 77.

[6] Kindī, *Al-Muṣannaf*, 18:62; Khalilieh, *Islamic Maritime Law*, 114.

[7] Scott, *Civil Law*, 4:208, Digest XIV, 2, 2, 2: "no appraisement can be made of the persons of freemen"; Ṭāher (ed.), *op. cit.*, 33; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:527–528; Qarāfī, *Al-Furūq*, 4:10; *idem*, *Al-Dhakhīra*, 5:487; Nuwayrī, *Al-Ilmām*, 2:243.

on the sea bottom and on shore, although they never considered any of it derelict. The law gave the real owners the first right to recover the property unless they consciously and voluntarily relinquished it.[8] Finally, vessels of any kind, with their tackle and nautical instruments, that were designed to sail on navigable waters for purposes of transport, fishing, pleasure or port services, were subject to contribution.[9]

Salvors and the Salvage Awards

Shippers, carriers, salvors, landowners, civil authorities and religious institutions had the right to salvage. So long as the shipper did not give up his maritime property, he had the absolute right to control execution of the salvage operation, unless he was incompetent. In imminently perilous situations, the ill-fated shipper needed to make

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[8] Scott, *op. cit.*, 4:209, Digest XIV 2, 2, 7; 4:211, Digest XIV 2, 8; 9:160, Digest XLI 1, 9, 8; 9:171, Digest XLI 1, 44; 9:175, Digest XLI 1, 58; 9:189, Digest XLI 2, 21, 1; Digest XLI 2, 21, 2; 9:224, Digest XLI 7, 7; Digest XLI 13; 10:262, Digest XLVII 2, 43, 11; 10:300, Digest XLVII 9, 1; 10:301–305, Digest XLVII 9, 1, 5; Digest XLVII 9, 4, Digest XLVII 9, 4, 1, Digest XLVII 9, 4, 2, Digest XLVII 9, 5, Digest XLVII 9, 6, Digest XLVII 9, 8, Digest XLVII 9, 12; Ashburner, *op. cit.*, 112, Article III:38; 117–119, Articles III:45, III:46 and III:47; Freshfield, *Manual of Later Roman Law*, 203, 205; Dareste, "*Lex Rhodia*," 23, 27; Pardessus, *Lois maritimes*, 1:254, 256–257; Justice, *General Treatise*, 109, 112–113; Letsios, *Das Seegesetz der Rhodier*, 180–182, 264, 266; Makris, "Ships," 1:95; Ṭāher (ed.), *Akriyat al-Sufun*, 29–30; Khalilieh, *Islamic Maritime Law*, 114–115; Ibn Fāyiʿ, *Aḥkām al-Baḥr*, 550–551.

[9] Scott, *op. cit.*, 10:300, Digest XLVII, 9, 1; 10:301–303, Digest XLVII, 9, 3, Digest XLVII, 9, 3, 6, Digest XLVII, 9, 3, 8, Digest XLVII, 9, 6; Ashburner, *op. cit.*, 117–118, Articles III:45 and III:46; Freshfield, *Manual of Later Roman Law*, 205. One of the earliest salvaging incidents reported in Arabic literature took place off the Egyptian on the Mediterranean. Abū al-Salṭ, son of the Umayyād ʿAbd al-ʿAzīz and a renowned physician and mathematician of Muslim Spain, traveled to Egypt in 510/1126 to re-float a ship loaded with copper, which had sunk near the coast. The Egyptian government aided him in every way while he constructed instruments that he eventually attached both to a large ship and the capsized vessel. It is reported that silk ropes were fastened to the instruments, which were thrown into the water, where divers attached them to the wreck. The ropes were wound around the ship by the instruments to raise the vessel. However, as it came to surface, the ropes broke under the burden and the vessel sank to the seabed again. The authorities threw Abū al-Salṭ into prison for his unsuccessful attempt. See Nadavi, "Arab Navigation," 125–126. The A. S. and most Islamic legal inquiries do not refer to the salvage of ship apparatus, but discuss at length the legal status of the ship when its tackle and instruments are thrown overboard under peril. For further details see chapter four, esp. pp. 165–172.

speedy decisions and contract shippers and/or crewmen aboard the same ship, or those sailing in the same convoy,[10] so that they could render immediate assistance in recovering cargo before it was damaged or lost at sea. Although the Digest entitled salvors who responded at once to remuneration,[11] it did not specify their rewards. By contrast, the N. N. contained explicit statutes regarding pecuniary compensation for the captain and crew when cargo was salvaged during a voyage, to avoid any exploitation on the part of the salvor. The amount due the salvor in the case of a ship in distress did not depend upon the conditions and sum he stipulated, but rather on treatise charters. Where a ship was destroyed on the high seas, a salvor was to receive one-fifth of what he managed to recover from the cargo—from the ship itself or as flotsam—and bring safely to shore.[12] However, remuneration was higher if the goods were salvaged from the sea bottom.[13] Rewards due the salvor were thus calculated on the basis of the success achieved and the risks involved; without a successful recovery of some maritime property, the salvor would be deprived of any reward payment, regardless of the efforts and time he invested. Nonetheless, compensation never exceeded the value of the salvaged property. In addition, the shipper, as established in the Digest and N. N., retained title to cargo intentionally jettisoned for the purpose of lightening an imperiled ship or lost in a shipwreck.[14] The fixed

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[10] Convoy sailing aims to protect merchantmen from hostile attacks and/or provide assistance when encountering the perils of the sea.

[11] Rose Melikan, "Shippers, Salvors, and Sovereigns: Competing Interests in the Medieval Law of Shipwreck," *The Journal of Legal History* 11 (1990), 163–164. For an inside look, see also legal references in footnote 8.

[12] Ashburner, *op. cit.*, 117–118, Articles III:45 and III:46; Dareste, "*Lex Rhodia*," 27; Pardessus, *Lois maritimes*, 1:256–257; Justice, *General Treatise*, 112; Freshfield, *Manual of Later Roman Law*, 205; Letsios, *Das Seegesetz der Rhodier*, 266.

[13] Ashburner, *op. cit.*, 112, 117–119; Dareste, "*Lex Rhodia*," 23, 27; Pardessus, *Lois maritimes*, 1:254, 256–257; Justice, *General Treatise*, 109, 112; Letsios, *Das Seegesetz der Rhodier*, 264, 266. An identical article was included in the Maritime Law of the Osterlings. Article XIV states: "If a ship be lost in the open sea, so that persons find goods floating on the wide sea, and they salve them and bring them to land, they shall have the twentieth part." By contrast, the Wisby Town-Law on Shipping allotted fifty percent [50%] of the value of a salvaged cargo or ship found out of sight of land. Tranian legists propounded an identical rule. The Maritime Ordinances of Trani entitled the salvor to retain half the total amount of the cargo if the real owner was identified and appeared before the court. However, if he did not show up within 30 days, the salvor would have exclusive right to the maritime property. See Twiss, *Black Book of the Admiralty*, 4:367, 405, 537. On medieval European practices, see Melikan, "Shippers, Salvors, and Sovereigns," 166–171.

[14] Kazhdan *et al.*, *Oxford Dictionary of Byzantium*, 3:1834.

percentage that the N. N. allocated to crewmen for salvaging maritime properties can be explained by the system for awarding profits to crew in Byzantium. The profit-sailing method of wage payment called for proportional division of the venture's profits, including awards from salvage operations, between ship owner and crew. Specifically, the crew had to distribute the salvage award among themselves proportional to their position in hierarchy on the ship. The owner of the salvaging vessel was probably eligible for the largest reward on account of the danger to which he exposed his property, and the risk of loss he ran in allowing his vessel to engage in such a perilous undertaking.

Rules regarding the performance of salvage on the high seas were debated among the *fuqahā'*, though the majority adopted the canons in the Digest. Islamic law neither entitled a salvor to take possession of maritime property retrieved from the sea nor barred him from seeking a pecuniary reward. Moral and religious liability bound carriers and shippers on an imperiled ship or aboard other vessels in a convoy to assist in recovering goods and private belongings jettisoned to avert foundering or afloat at sea.[15] The standard adopted by some Mālikī and Zāhirī jurists in assessing the reward was not linked to the benefit derived from the salvaged property, but to the labor the salvor expended in rendering the service.[16] They further ruled that salvaging goods on the high seas was mandatory, if such an operation did not involve risk to the salvor and/or his craft.[17]

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[15] Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 5:310–311; Idris, "Commerce maritime," 225; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 182–183.

[16] Apportioning the award was regulated by local custom, which at best entitled the salvor to indemnity for his exertions, besides, of course, for carriage and storing expenses. Nevertheless, if he undertook the salvage voluntarily, he might not receive restitution. Ḥanbalī lawyers entitled a salvor to remuneration commensurate with his exertion, in addition to his other expenses. By contrast, the Shāfiʿīs deprive the salvor of the right to a pecuniary compensation for his labor, even if the cargo was redeemed or salvaged from a thief, a usurper, or the sea. Ibn Ḥazm, *Al-Muḥallā*, 84; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 176–179. The Osterlings' lawyers propounded similar principles, ruling in Article XV thus: "Should it be that persons find goods driven upon a beach, or that a ship breaks up within a harbour, or runs upon an anchor which damages it, or that misfortune in any way happens to a ship, to those who help to salve the goods and bring them to land, wages shall be paid for their work, as trustworthy persons shall decide that they have deserved, and the persons shall pay those wages, to whom the goods belonged, before the ship was lost." See Twiss, *Black Book of the Admiralty*, 4:367–369.

[17] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 235–236.

This ruling accorded with the principle instituted in Article III:22 of the N. N.: "If the captain is minded to put in other cargo after this, if the ship has room, let him put it in; if the ship has no room, let the merchant before three witnesses resist the captain and sailors."[18] Letters of Jewish traders from the eleventh century report how shipmasters occasionally refrained from salvaging jetsam, lest it overload and subsequently endanger their vessels.[19]

A review of the N. N. reveals that crew and passengers aboard a vessel in distress had the right to salvage and to collect compensation, which provided them with an incentive to assist in saving life and property. By contrast, the Digest and most Islamic case law tended to confine such a right to strangers to that vessel, in a legal attempt to prevent seamen from causing a disaster in order to benefit from it. Hence, the crew and officers of a ship could not generally claim remuneration for salvaging the ship or cargo after she was sunk. Passengers were also required to take part in facing the common danger. They could not expect to be rewarded for helping to save their own lives and property and the property of others on the same ship. Only a handful of Muslim jurists entitled a salvor to a reward for his salvage services during his own voyage. Both parties, shipper and salvor, were to negotiate and approve the terms of the pecuniary reward before the salvage operation, otherwise, it was up to the judicial authorities to determine the award to the salvor.

The shipper's retention of title to goods and private belongings applied to property cast up on the shore. Property found on the coast or in sight of land could be salvaged by individuals, the local community or landowners, or civil authorities. Regulations pertaining to shipwrecked property washed up on the coast and found by a spontaneous salvor are addressed in Article III:47 of the N. N. This states that if maritime properties were cast from the sea to land and found there or carried to within one cubit of the land, the salvor would receive one-tenth part of what was salvaged.[20] The general attitude of Muslim jurists was that property found on shore had to

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[18] Ashburner, *op. cit.*, 102–103.

[19] Gil, *In the Kingdom of Ishmael*, 2:526 [180], TS 10 J 19, f. 19, ll. 11–14; Goitein, "Jewish Trade," 378–379.

[20] Ashburner, *op. cit.*, 119; Dareste, "*Lex Rhodia*," 27; Pardessus, *Lois maritimes*, 1:257; Justice, *General Treatise*, 113; Freshfield, *Manual of Later Roman Law*, 205; Letsios, *Das Seegesetz der Rhodier*, 266.

be delivered to the rightful owner providing the latter rewarded the salvor in return.[21]

Islamic law addressed the issue of coastal salvage further. During the eighth century Muslim lawyers took positions as to the status of items found in coastal areas settled by *dhimmī*s. When Mālik Ibn Anas was asked about a salvage found in a coastal settlement populated by *dhimmīs* only, he answered: "It should be delivered to their religious leaders [*aḥbārihim i.e.* priests and rabbis]." Ibn Rushd advised Islamic civil and legal authorities to handle such a case carefully "for it is in the realm of possibility that the merchandise may belong to a Muslim, even if it was found by a *dhimmī*." As a precaution, the salvage was not to be delivered to their religious leaders, unless it was determined, beyond the smallest doubt, that the merchandise belonged to their community. If the merchandise was handed to their religious leaders after identification and its owner showed up, it had to be returned to him. On principle, the property was to be delivered to the religious community [*milla*] from the start, if it could be ascertained that it belonged to one of their coreligionists. If, however, it was not verified that the owners were *dhimmīs*, then, accordingly, the merchandise should not be handed over to their religious leaders, and must become an endowment in perpetuity [*mawqūfa*] to the community.[22]

Maritime property could either be retrieved pursuant to a contract with an experienced salvor or discovered by a casual finder. Historical records confirm that, as early as the second century B.C., the Roman law recognized the rights of salvage divers to part of what they recovered.[23] By the late first century and early second century, professional unions were established, including the divers' guild known as *urinatores*, which specialized in salvaging jettisoned goods.[24] The Roman compendium, which appears in the Corpus Juris Civilis under the Rhodian Law of Jettison [Digest XIV, 2, 4, 1], confirms the employment of professional divers to salvage goods from the sea floor:

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[21] Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 5:310; Khalilieh, *Islamic Maritime Law*, 111.
[22] Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 15:375.
[23] Frost, "Scyllias: Diving in Antiquity," 183–184.
[24] Sirks, *Food for Rome*, 256; Casson, *Ancient Mariners*, 200; *idem*, *Ships and Seamanship*, 370; Sperber, *Nautica Talmudica*, 112–113.

> Sabinus also advised that if a ship, which had been lightened in a storm by throwing overboard the goods of one merchant, is sunk at a later stage of the voyage, and the goods of some other merchants are recovered by paid divers, the merchant whose goods were jettisoned is entitled to a contribution from those whose goods were subsequently recovered by the divers. But those whose goods are not so recovered have no recourse against the person whose property was jettisoned during the voyage, even if divers get some of it back for him, since their goods cannot be seen as having been jettisoned to save a sinking ship.[25]

Unlike Sabinus's ruling, which did not determine the payment due to salvage divers for recovering maritime properties, the N. N. states an exact amount and associates it with two cardinal factors: (a) the perils incurred in salvaging the property, and (b) the value of the property salvaged. Article III:7 states:

> If gold or silver or anything else is raised from the sea from a depth of eight fathoms,[26] let the salvor receive one-third. If it is raised from a depth of fifteen fathoms, let the salvor receive one-half by reason of the danger of the sea. . . .[27]

Thus, the pecuniary reward was compatible with the circumstances of recovery, the state, condition, and type of property salvaged, as well as the depth and risk of a salvage operation. Remuneration to the salvor depended first and foremost on the degree of danger involved in recovering the property and the success achieved, but not on the services he rendered. Accordingly, if the salvor did not retrieve the whole property, he was not eligible for the whole reward, but could collect partial remuneration commensurate with the value of goods he successfully salvaged. Be that as it may, divers could not acquire a reward beyond the value of the salvaged properties, nor title to shipwrecked goods unless the actual owner voluntarily relinquished it. The rulings of the Rhodian lawyers thus reflect a practical interest in salvaging wrecked property.

With the exception of some individual jurists like Ibn Ḥazm, a famous Andalusian scholar of the Zāhirī law school, the great majority

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[25] Watson, *Digest of Justinian, Book Fourteen*; Scott, *op. cit.*, 4:209–210.

[26] A fathom is the distance across the breast from the tip of one middle finger to the tip of the other when the arms are outstretched, five to six [5–6] feet (somewhat less than two [2] meters)—used chiefly in measuring cables, cordage, and the depth of navigable water.

[27] Ashburner, *op. cit.*, 119; Letsios, *Das Seegesetz der Rhodier*, 181.

of Muslim *ʿulamāʾ* (scholars) propounded rulings similar to those of the Digest's lawyers. By contrast, Ibn Ḥazm and a few advocates allowed a salvor to gain title to maritime properties salvaged through diving: "Whoever dives and retrieves goods and property from the bottom of the sea has the right to possess them."[28] Shīʿite jurists, like the great majority of *Sunnī ʿulamāʾ*, authorized salvage divers to take possession of derelict maritime properties only. They decreed that whatever salvage divers retrieved from the sea floor became their possession, as long as the owners relinquished their claims to it or could not be identified. Furthermore, the owner of the maritime property had to grant the salvor an equitable indemnity consisting of a wage comparable to his exertions, and expenses.[29]

Business letters from the Cairo Geniza confirmed that salvage divers, like the Roman *urinatores* mentioned in the Digest,[30] offered their services in major Islamic port cities. For example, letter dated May 27, 1050 described the salvage of merchandise that fell into the sea in the process of unloading.[31] Another letter addressed by Khalaf Ibn Isaac Ibn Bundār (c. 1139) to Abraham Ibn Yijū, a prominent Jewish trader from India, described how he contracted professional divers from ʿAden to salvage shipwrecked property from the Strait of Bāb al-Mandeb:

> The pepper was lost completely; God did not save anything of it. As to the iron, mariners were brought from ʿAden, who were engaged to dive for it and salvage it. They salvaged about one-half of the iron, and, while I am writing this letter, they are bringing it out of the Furḍa [the customhouse of ʿAden] to the storehouse of the illustrious elder, my master Maḍmūn b. al-Ḥasan. All the expenses incurred for the diving and for transport will be deducted from whatever will be realized for that iron and the rest will be divided proportionally, each taking his proper share.[32]

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[28] Ibn Ḥazm, *Al-Muḥallā*, 84: "*man ghāṣa ʿalā shayʾ fa-huwa lahu.*"

[29] Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 5:312; Ṭūsī, *Tahdhīb*, 7:219; Ḥillī, *Al-Sarāʾir*, 2:195; Aḥmad al-Khawansārī, *Jāmiʿ al-Madārik fī Sharḥ al-Mukhtaṣar al-Nāfiʿ* (Teheran, 1985), 6:72–73; Muḥammad Bāqir Majlisī, *Milādh al-Akhyār fī Fahm Tahdhīb al-Akhbār* (Cairo, 1985), 11:418; Khalilieh, *Islamic Maritime Law*, 110; Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 177–178.

[30] See note 24.

[31] Gil, *op. cit.*, 3:614 [485], TS 12.545, l. 20: ". . . the divers salvaged nine bales and brought them to the al-Askariyya (*kharrajū lakum al-ghaṭṭāsīn 9 [aʿdāl] ilā al-Askariyya*)."

[32] Goitein, *Letters*, 189 [38], TS 24.64; Khalilieh, *Islamic Maritime Law*, 110; Chakravarti, "Ship-owning Merchants in the West Coast of India," 46.

Contracting professional divers and experienced mariners to recover maritime properties from the sea floor can be termed *contractual salvage*. The contracting parties could conclude the terms of the salvage agreement and negotiate the remuneration before actual salvage commenced. Salvors were ordinarily compensated on the basis of successful services taking into account the peril involved in reaching the property and its monetary value.

Formalities and Legal Procedures

Byzantine and Islamic legal systems alike asserted that regardless of whether the jettisoned goods were found on the open sea, in bays, or shallows or on shores, neither salvors nor civil or religious authorities could acquire rights over such goods, if the rightful owner was identified.[33] Yet three cardinal questions remain: First, did the salvor, who discovered the property on the coast, have a right to seek remuneration? If so, how was it reckoned? And in what circumstances was the salvor or finder allowed to keep his finds?

The regulations in the Digest favored commercial interests and were concerned with protecting the shipper, whose goods could also be found by chance salvors. Where local populations in coastal areas found shipwrecked property, the salvors could retain the goods after notifying the local authorities. However, if the salvor retained possession of the shipwrecked goods without making such notification and consumed or used them for private or commercial purposes, he was considered a thief, and subject to criminal prosecution.[34] The Digest acknowledged the possibility that maritime property could be properly retained by salvors on behalf of its owner/s.[35] However,

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[33] Scott, *op. cit.*, 9:189, Digest XLI, 2, 21. Even if the cargo was deliberately thrown overboard under severe conditions, it cannot be considered as abandoned for it—has been temporarily relinquished on the account of safety'. *Ibid.*, 10:305, Digest XLVII, 9, 12; Khalilieh, *Islamic Maritime Law*, 110–111.

[34] Scott, *op. cit.*, 4:211, Digest XIV, 2, 8; 9:160, Digest XLI, 1, 9, 8; 9:171, Digest XLI, 1, 44; 9:175, Digest XLI, 1, 58; 9:189, Digest XLI, 2, 21, 1; 9:224, Digest XLI, 7, 7; 10:262, Digest XLVII, 2, 43, 11; 10:300–305, Digest XLVII, 9, 1; Digest XLVII, 9, 1, 5; Digest XLVII, 9, 3; Digest XLVII, 9, 3, 1; Digest XLVII, 9, 3, 2; Digest XLVII, 9, 3, 6; Digest XLVII, 9, 3, 8; Digest XLVII, 9, 4; Digest XLVII, 9, 4, 1; Digest XLVII, 9, 5; Digest XLVII, 9, 6; Digest XLVII, 9, 12.

[35] Scott, *op. cit.*, 10:262, Digest XLVII, 2, 43, 11 rules: "*Ulpianus, on Sabinus, Book*

neither individuals and landowners, nor the state treasury, had the right to take advantage of the victims of such an unfortunate incident.[36] Criminal misconduct on the part of the salvor could result in civil liability as well as criminal punishment. For instance, if he seized possessions from a wreck without declaring them, he would be liable to pay four times the value of the wreck to the real owner.[37] Neither the Digest nor the N. N. refers explicitly to the period after which salvaged maritime property retained by a salvor could become his private possession.[38]

Islamic jurisprudence is more informative on this topic than the Digest and the N. N. After discovering maritime property on the coast or floating in sight of land, the salvor was bound to observe proper juridical procedures to avoid criminal prosecution. According to Ibn al-ʿAṭṭār (329–399/941–1009), a distinguished Cordovan jurist and notary, the salvor could either preserve salvaged items or deliver them to the *qāḍī* or local governor if the name of their rightful possessor was obliterated or unmarked. If he decided to retain the property, he had to write a deed, which served as formal notice of his possession of it depicted the quality and quantity of salvaged items, location and date (day, month, year) of discovery, and make known the public places, such as city gates, mosques, market places and baths, where the find was advertised.[39] Salvaged valuables habitually

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XLI: 'When anyone carries away property which has been thrown overboard from a ship, is he guilty of theft? In this case, the question is whether the property was considered to be abandoned. If he who threw it overboard did so with the intention of abandoning it, which, in general, should be believed, as he knew that it would be lost, he who finds it makes it his own, and is not guilty of theft. When, however, he did not have this intention, but threw it overboard for the purpose of keeping it, if it should be saved, he who finds it can be deprived of it. If the latter was aware of this, and holds the property with the intention of stealing it, he is guilty of theft; but where he retained it with the intention of preserving it for the owner, he will not be liable for theft. If, however, he thought that the property had simply been thrown overboard, he will still not be liable for theft'."

[36] Melikan, "Shippers, Salvors, and Sovereigns," 164.

[37] Ashburner, *op. cit.*, 124, Article III:50.

[38] *Ibid.*, ccxc–ccxciii; Melikan, "Shippers, Salvors, and Sovereigns," 170; Pardessus, *Lois maritimes*, 1:346–351. This issue is manifest in medieval European legal codices: e.g., Article 252 of the *Consulate of the Sea* rules that the property is kept for a year and a day. If the owner does not appear within this fixed period, the property would be divided as follows: a half to the salvor, a quarter to the civil authority, and a quarter to a needy religious institution.

[39] Rajab, *Al-Qānūn al-Baḥrī al-Islāmī*, 160–162. Once the finder brought the salvaged objects to safety he had to advertise his discovery in public places, markets

remained in the salvor's custody for one lunar year from the moment they were brought to the public's attention.[40] Committing the deed to writing ensured that if the salvor died unexpectedly during that interval of his retention of the goods, his heirs would have to transmit the salvaged items to the actual owner if he showed up during the allotted time. If the period elapsed and the real owner did not appear, the salvor could either take possession of the salvaged property or donate it to pious foundations after writing the date of release on the deed for it.[41]

A salvor might also petition the local court to obtain free and clear title of the salvaged goods. The *qāḍī* would call upon him to testify before the court about the date of discovery and the circumstances of the salvage. If the *qāḍī* could verify the testimony, based upon the testimony of two credible witnesses, he would issue a written declaration designating the salvor's identity, the date and location of the salvage, the type and quantity of salvaged items, public places where notice of the salvage had been advertised, and the duration of the waiting period. The judicial authorities never issued such a certificate of discharge or enabled salvors to seize salvaged property, unless the stated interval had elapsed and the actual owner had not appeared to claim it. Finally, when the *qāḍī* substantiated the salvor's testimony, he would conclude the judicial process by issuing the deed.[42] In instances when the salvor transferred the property

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and mosques, to spread the news among the common and enable the merchant to retrieve his cargo within a short, time before the interval period elapsed. If the salvaged article was valuable, it had to be advertised every day for a week, then once a week for a month, and finally once a month until the end of the lunar year. If the salvor could not advertise his discovery in public places, he might hire a trustworthy person for a wage, the actual owner to meet that expense once he identified his property. If the finder died during the interval, his heir(s) could not inherit the salvaged items before the end of that period.

[40] Salvors could keep an object worth twenty [20] *dīnār*s or more after one lunar year [*hijrī*], that is 355 days and lower-priced articles after a few days. See Ibn al-ʿAṭṭār, *Al-Wathā'iq wal-Sijillāt*, 128; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 15:375; Ibn Ḥazm, *Al-Muḥallā*, 7:84; Minhājī, *Jawāhir al-ʿUqūd*, 1:407–409.

[41] Muḥammad Ibn Aḥmad Ibn al-ʿAṭṭār, *Al-Wathā'iq wal-Sijillāt* (Madrid: Academia Matritense del Notariado Instituto Hispano-Árabe de Cultura, 1983), 127–129; Marrākishī, *Wathā'iq al-Murābiṭīn wal-Muwaḥḥidīn*, 614–616.

[42] A Geniza letter dated from January 1143 deals with a foreign Jewish merchant, who drowned off Alexandria. His salvaged cargo was first handed over to the *qāḍī*. When he verified that it belonged to a Jew, the *qāḍī* called for two Jewish witnesses to endorse the transfer of the salvaged shipment to Samuel ha-Nagīd, head of the rabbinical court in Alexandria. See TS 13 J 3, f. 4; Goitein, *Mediterranean Society*, 1:62; Khalilieh, *Islamic Maritime Law*, 112–113.

to the court during the period of retention, the *qāḍī* would entrust it to a reliable guardian for safekeeping, and he would advertise the discovery in public places. If the interval elapsed, but the owner had not appeared before the court, the *qāḍī* would call upon the reliable witnesses, the guardian, and the salvor to endorse three copies of the certificate of discharge: one copy went to the court archive, another to the guardian and the third to the salvor. Such a certificate normally described the quality and quantity of the cargo, the public centers where the salvage had been advertised, the duration of the intervening period, and the dates of issuing the judgment and releasing the salvaged cargo.[43]

Ibn al-ʿAṭṭār's *Notarial Formulae* also instructed the judicial authorities and salvors how to compose a certificate of delivery when the rightful owner appeared to claim his salvaged property. Two male witnesses had to be present to attest and endorse the certificate, which contained details as to the salvor's personal identity, the salvage date and location, and the details concerning advertisement in public places. In addition, the proprietor's name and delivery date had to be specified once he recognized identifying marks on his property.[44] However, if the salvor violated legal procedures, either by selling or retaining the salvaged property, he would pay a penalty corresponding to the value of the salvaged object.[45] If the true proprietor of the salvaged articles did not appear to claim his cargo or decided to relinquish the damaged portion, the salvor would be at liberty either to keep the goods or deliver them to religious foundations and the indigent.[46]

International Treaties

One of the foremost and most interesting aspects of salvage regulations was the legal status of jetsam found within territorial waters

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[43] Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 2:815–817; Ibn al-ʿAṭṭār, *Al-Wathā'iq wal-Sijillāt*, 130–131; Marrākishī, *Wathā'iq al-Murābiṭīn wal-Muwaḥḥidīn*, 616–617; Minhājī, *Jawāhir al-ʿUqūd*, 1:405–409.

[44] Ibn al-ʿAṭṭār, *Al-Wathā'iq wal-Sijillāt*, 132–134; Marrākishī, *Wathā'iq al-Murābiṭīn wal-Muwaḥḥidīn*, 617–619.

[45] Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 15:375.

[46] *Ibid.*, 15:372–373; Ṭāher (ed.), *op. cit.*, 30; Minhājī, *Jawāhir al-ʿUqūd*, 1:407; Kindī, *Al-Muṣannaf*, 18:61 and 22:149.

and on the shores of a foreign territory. Overseas trade in the Mediterranean could not have flourished and states' tax revenues could not have increased, unless the interests of both local and foreign merchants were protected. For this reason, central and provincial authorities around the Mediterranean Sea concluded commercial and diplomatic treaties among themselves defining the status of maritime properties found off and upon their shores. The Russo-Byzantine treaty of 911, for instance, declared that if a Greek ship was cast ashore in the land of Rus, it was to remain safe and inviolate. Should it be plundered, the violator would be liable for the legal consequences.[47]

Legal and documentary evidence from the Muslim world shed further light on the juridical status of salvaged property belonging to a foreign merchant. The *Sharīʿa* (religious/sacred law) established that a *ḥarbī* (alien merchant) could enter and trade in *Dār al-Islām* (Abode of Islam) if equipped with an *amān* (safe conduct), regardless of whether the country from which he arrived maintained diplomatic relations with it or not.[48] The *musta'min* (enemy alien merchant), who enjoyed an *amān* pledge was immune from physical attack, enslavement, and confiscation of his possessions until he arrived safely back in his homeland, which enabled him to do business in any Islamic territory.[49] The Islamic-Christian international commercial and diplomatic

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[47] Kazhdan *et al.*, *Oxford Dictionary of Byzantium*, 3:1834.

[48] During his visit to Acre in Jumādā al-Ūlā (March, 1184), Ibn Jubayr observed Muslim merchants frequented Christian towns, as did Christians in Muslim territories, despite the pointless military campaigns between the Crusader and Muslim armies. He reports: "The Christians impose a tax on the Muslims in their land which gives them full security; and likewise the Christian merchants pay a tax upon their goods in Muslim lands. Agreement exists between them, and there is equal treatment in all cases. The soldiers engage in their war, while the people are at peace and the world goes to him who conquers." See Muḥammad Ibn Aḥmad Ibn Jubayr, *The Travels of Ibn* Jubayr, trans. by R.J.C. Broadhurst (London, 1952), 301; for the Arabic text see *Riḥlat Ibn Jubayr*, 260.

[49] Saḥnūn, *Al-Mudawwana*, 2:11; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 3:39–40, 60–61; Ibn ʿAbd al-Barr, *Al-Kāfi*, 1:481; Abū Zakariyyā Aḥmad Ibn Ibrāhīm Ibn Muḥammad Ibn al-Naḥḥās, *Mashāriʿ al-Ashwāq ilā Maṣāriʿ al-ʿUshshāq wa-Muthīr al-Gharām ilā Dār al-Islām* (Riāḍ: Dār al-Nashr al-Islāmiyya, 1990), 2:1056; Khalilieh, *Islamic Maritime Law*, 123–126; Ḥamīdullāh, *Muslim Conduct of State*, 186–188, 237–239. With that, however, some jurists issued rulings that did not conform to the guidelines stated here. An inquiry attributed to Ibn al-Mawwāz allowed Muslim salvors to seize and keep salvaged jetsam and flotsam found off or on Islamic shores. If the salvage consisted of silver and gold, a fifth of their value was to be delivered to the state treasury. See Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 5:311.

treaties that survived from the eleventh century onwards reflect the actual life and legal status of alien merchants, ship owners and seamen in Islamic territories. The authorities on both sides acknowledged that whatever was rescued from danger, be it human lives, a ship and its gear, cargo, or their wrecked remains, should be released to the rightful owner(s). Maritime property found in Islamic territorial waters or on coasts was not considered derelict unless the real owner(s) voluntarily relinquished it, or did not show up during the period designated by international treaties, local custom or sacred law. Most importantly, many such treaties included conditions requiring both parties to assist imperiled ships and goods in coastal and/or inland waters. Muslim judicial and civil authorities frequently delivered items salvaged from jetsam or flotsam within Islamic territorial waters to the rightful owner(s) in person. Alternatively, the authorities would transfer the salvaged maritime property, if it was established with certainty that it belonged to an alien merchant, to a consul who returned it to its owner.[50] Despite the lack of written evidence from earlier times, it is not unreasonable to postulate that the existence of prior between the Christian and Muslim worlds.

Salvaged Property and Freight Charges

Whether the shipper had to pay the freight charges for salvaged goods is unclear in Romano-Byzantine law. However, Islamic law explicitly and implicitly ruled that when jettisoned cargo was salvaged, the merchant was obliged to pay the ship owner freight, even if he donated his salvaged goods to religious or private endowments.

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[50] M.L. De Mas Latrie, *Traités de paix et de commerce et documents divers concernant les relations de Chrétiens avec les Arabes de l'afriques eptentrionale au mayon age* (New York: Burt Franklin, 1960), 2:97–98; Michele Amari, *I Diplomi Arabi del R. Archivio Florentino* (Firenze: Dalla Tipografia di Felice le Monnier, 1863), 7–13, 17–22, 29–35, 45–47, 70–71, 86–111, 123–164, 169–180, 184–209, 214–217, 221–236; John Wansbrough, "The Treaties of the Early Mamluk Sultans with the Frankish States," *Bulletin of the School of Oriental and African Studies* 43 (1980), 67–76; *idem*, "The Safe-Conduct in Muslim Chancery Practice," *Bulletin of the School of Oriental and African Studies* 34 (1971), 20–35; *idem*, "Venice and Florence in the Mamluk Commercial Privileges," *Bulletin of the School of Oriental and African Studies* 28 (1965), 483–523; *idem*, "A Moroccan Amīr's Commercial Treaty with Venice of the Year 913/1508," *Bulletin of the School of Oriental and African Studies* 25 (1962), 449–471; *idem*, "A Mamluk Letter of 877/1473," *Bulletin of the School of Oriental and African Studies* 24 (1961), 200–213.

Freight payment norms depended on two factors: the distance covered by the ship and the condition and quality of the salvaged cargo.[51] This is explained in the following inquiry:

> From the book of Ibn Saḥnūn: The *qāḍī* of Tripoli wrote to Saḥnūn to inquire about a vessel wrecked off Barqa. Six consignments were brought from her to Tripoli. A person who brought these consignments claimed they were salvaged from that wrecked vessel. Some of these bales were identified by their owners, while others were unidentified, since the owners' names had been obliterated. The goods whose owners were unidentified were sold for a sum of *dīnār*s. There was a lease for the bales transported [to Tripoli]. Then I called for the identified shippers whose bales remained intact to make an appearance, so that I could look at the state of their merchandise, but they declined to take them back and said: "We donate part of our shares of the salvaged bales to [religious endowments]. Go ahead and sell [that part of the goods] because the water penetrated into portions of it." I took over from him the six bales with their lease and retained the remainder. The ship owner showed up demanding the freight charges. He (Saḥnūn) wrote back to him: If the leasing contract was originally executed upon sailing from Miṣr [Fusṭāṭ] to Tripoli, then the opinion of Mālik applies and rules that the freight is payable upon reaching the destination; however, Ibn Nāfiʿ approves of paying him (the lessor) in accordance with the distance covered. But in your inquiry, there were loads that safely arrived in Tripoli. This issue is similar to the question addressed to Mālik concerning the wage of a borer. [If] a borer dug a well but did not bring his task to a successful completion, and the owner of the well hired somebody else to complete the digging, the former borer should be paid commensurate with the amount of his work. So is the ship owner, who is entitled to collect the freight in proportion to the profit accruing to the merchants for transporting their goods from Miṣr [Fusṭāṭ] to Barqa; the shipping charges are reckoned commensurate with the profits they reaped from their sales. Concerning the prices of the bales, it is imperative to register the quality of each bale and the price it fetched, and then keep it in storage. If the waiting period is extensive, and the rightful owner does not appear, and the sum [is small enough] that it is not worth holding any longer, the *qāḍī* is authorized to donate its selling price to religious endowments.[52]

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[51] Ṭāher (ed.), *op. cit.*, 28, 29–30, 35, 37; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:113; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 15:358–359, 373–374; Nawawī, *Rawḍat al-Ṭālibīn*, 7:194; Ibn Taymiyya, *Fatāwā*, 30:414–416; Ibn Ḥazm, *Al-Muḥallā*, 7:84; Ṭūsī, *Tahdhīb*, 7:219; Ḥillī, *Al-Sarāʾir*, 2:195; Khawansārī, *Jāmiʿ al-Madārik*, 6:72–73; Majlīsī, *Milādh*, 11:418; Kindī, *Al-Muṣannaf*, 18:61, 63; 22:149; Minhājī, *Jawāhir al-ʿUqūd*, 1:407–409.

[52] Ṭāher (ed.), *op. cit.*, 29–30.

Summary

With regard to salvage, the Corpus Juris Civilis, N. N., and Islamic jurisprudence have three elements in common. First and foremost, regardless of whether the goods were found afloat, on the sea bottom or on shore, they were not considered derelict unless the rightful owner consciously abandoned them or did not claim them. In addition, all three bodies of law required crew and shippers to assist sea voyagers in distress. However, on principle, they dismissed any demand to compensate a salvor who rescued human lives, especially those of freeborn persons, because they performed a service that was seen, both from a civil and religious standpoint, as a moral and indispensable. Rescuing human beings stranded on the high seas was mandatory unless the salvage operation endangered the salvaging vessel.[53] Lastly, salvors were obliged to inform the civil or judicial authorities of their discovery, although they were not necessarily required to deliver salvaged goods to them.

The N. N. determined the reward granted to a salvor according to two fundamental principles: (a) the perils involved in salvaging and (b) the market value of the salvaged jetsam and flotsam. It stipulated a reward of twenty percent [20%] of the value of salvaged goods found floating on the high seas. However, the shipper paid the salvor fifty percent [50%] of the value of goods they salvaged from a depth of fifteen [15] fathoms and thirty-three percent [33%] if they were raised from eight [8] fathoms. Rhodian legists emphasized "value" as opposed to "price". They determined that in awarding salvage, its value had to be estimated on the basis of market prices at the place from which it was purchased or fetched,[54] excluding freight charges. By contrast, regulations found in the Digest and Islamic sea law favored commercial interests and reflected practical protection for the shipper. In limited and exceptional cases, the compilers of the Digest and Muslim jurists required the owners of salvaged goods to compensate salvors for their exertion, as well as for

[53] Human cargo, *i.e.*, slaves, were treated the same as mercantile commodities.

[54] Favoring the commercial interests of merchants Romano-Byzantine lawmakers employed two different financial methods in computing the rewards. Whereas the salvors' rewards are calculated on the basis of the value of the maritime property at the port of origin, the legists computed the contribution for jettisoned goods on the basis of the price for which the jetsam would fetch at the destined port.

expenses related to the transport and storage of salvaged cargo. In other words, a salvor engaged to salvage flotsam or jetsam was treated as a private employee and paid for his services, whether he was successful or not. He could be paid on an hourly, daily, or weekly basis, depending on the amounts to be salvaged.

Romano-Byzantine and Islamic laws did not deprive the shipper of the title to his goods cast up on the shore, unless he voluntarily and consciously abandoned them. At a fundamental level, the laws ratified a salvor's right to retain maritime property but did not empower him to expropriate it unless the judicial authorities so adjudicated, or the rightful owner explicitly and voluntarily relinquished possession. However, unlike the Digest and N. N., which did not clearly instruct salvors how to handle maritime properties, Islamic law laid down guidelines for the official and judicial procedures involved. Salvors first had to contact the rightful owners if their names were marked on cargoes. Otherwise, they had to notify the concerned judicial and/or civil authorities. Objects of low value were kept for no more than three weeks, while more valuable objects were retained for one lunar year before salvors could assume possession of them. If the proprietor did not show up by the end of the period, Muslim scholars favored donating maritime properties to religious foundations; or the salvors could retain them. If any salvor ignored official and judicial procedures and acted independently, he was held liable for the legal outcomes. Last but not least, whereas the Digest and the N. N. did not refer to salvors' liability for fault and negligence, Islamic law ruled that if a salvor was found guilty of negligence, looting, and spoilage of the salvaged property, he would forfeit part of the award.

CHAPTER SEVEN

COMMERCIAL LAW

General

Investment in commercial enterprises took varied forms that allowed a correspondingly great variety of opportunity and risk to the investor. Among the widespread forms of investment in Byzantium were the sea loan, in which an investor advanced money to a trader or ship's captain at the outset of a commercial voyage, and the *chreokoinōnia*, which made it possible for people of modest means to engage in profitable investment. Without that and other advanced techniques of commercial financing, Islamic trade, among neighboring provinces and overseas, could not have flourished in the eighth century and reached its zenith in the eleventh century. The dominant legal methods of financing commercial investments and transactions in the Muslim world were the *qirāḍ* (*commenda*) and *sharika* (partnership) contracts. The following discussion will elaborate on the use of these methods and techniques in the Byzantine and Islamic cultures and trade system to determine whether the origins of the *qirāḍ* are rooted in the *chreokoinōnia.*

The Sea Loan

Prior to the use of the *chreokoinōnia*, traveling merchants and ship owners favored the sea loan as a commercial instrument to finance their domestic and international enterprises. By the fourth century B.C., professional moneylenders and creditors personally experienced in the practicalities of maritime trade could be found in the Athenian port of Piraeus.[1] They lent money to merchants and ship owners for

[1] This statement should not be interpreted to mean that the Greek world established the foundations for the maritime loan. Indeed, many financial systems and institutions, including the sea loan, can be traced back to the second millennium B.C.: much of the earliest historical record from the Fertile Crescent—Sumer,

the duration of either a one-way or a return-trading voyage. Loan and interest were repaid from the proceeds of the sale of the cargo, but only on condition that the ship arrived safely at her destination. In other words, if, as the result of shipwreck or piracy, the ship and her cargo were lost, the borrower was freed from all obligations to repay the moneylender, who himself bore the loss.[2] Thus, maritime loans differed crucially from all other types. Because of the risks involved, the interest rates were high on sea loans—anywhere from 12.5 percent to 30 percent per voyage and sometimes even higher.[3] As a partial protection against fraud on the part of the borrower, the cargo was offered as security; if the borrower was also the ship owner, the ship herself could be pledged. In addition, there was usually a written contract that detailed the terms and conditions of the agreement.[4]

Of all the ancients, Demosthenes, classical Greece's greatest orator, presented in his speech in 340 B.C. the most lucid insights into maritime law and custom when he described at length the basic

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Babylon, and Assyria—concerns itself with the lending of money. Hammurabi's famous Babylonian Code devoted several articles to commercial law. See Steven J. Garfinkle, "Shepherds, Merchants, and Credit: Some Observations on Lending Practices in Ur III Mesopotamia," *Journal of the Economic and Social History of the Orient* 47 (2004), 1–30.

[2] Olga Maridaki-Karatza, "Legal Aspects of the Financing of Trade," in *The Economic History of Byzantium from the Seventh through the Fifteenth Century*, ed. Angeliki E. Laiou *et al.* (Washington, D.C.: Dumbarton Oaks Research Library and Collection, 2002), 3:1104, *Synopsis Basilicorum* (*Major*) X, 2, 73: "Maritime money is that which goes beyond the sea, not that spent on the spot and the things bought with it, if the sailing is at risk of the creditor."

[3] The interest rate is associated with four factors: (1) the cost of money to the lender is usually 12 percent but not more than 18 percent a year; (2) average time required for the voyage under favorable conditions; (3) the loan risk; and (4) the marine risk linked to the human perils of enemies and pirates. The political atmosphere could affect interest rates so that in wartime they could rise to 30 percent, while in peacetime the range was from 12.5 percent to 22.5 percent. This is one of the first historical demonstrations of the relationship between risk and return: 22.5 percent was high even for that period, reflecting the uncertainties of navigation and maritime trade. Moreover, the rate increased in wartime to compensate for the higher risk of cargo loss. See Calhoun, "Sea Loans in Ancient Athens," 577–580.

[4] Paul Millett, "Maritime Loans and the Structure of Credit in the Fourth-Century Athens," in *Trade in the Ancient Economy*, ed. Peter Garnsy *et al.* (London: Chatto and Windus, 1983), 36–52; *idem*, *Lending and Borrowing in Ancient Athens* (Cambridge: Cambridge University Press, 1991), 188–196; Reed, *Maritime Traders in the Ancient Greek World*, 38–42, 89–92; Cohen, *Ancient Athenian Maritime Courts*, 8, 122–124, 127–129; Casson, *Ancient Mariners*, 102–107.

principles of maritime loans.[5] For over a millennium and a half, until the high Middle Ages, these principles remained unchanged.[6] In accordance with the Code of Justinian IV and Digest XXII, 2, the maritime loan (*nauticum fœnus*) was made to (a) merchants trading at sea, so they could buy commodities to load in their ships or meet cargo-related expenses; and (b) ship owners for purposes of constructing, purchasing or renovating a vessel, or for paying seamen. The *nauticum fœnus* contained a pledge that could be used to secure either the goods purchased with the money lent, or goods to be purchased with the proceeds of the sale of those goods, or the borrower's goods on other ships, or the borrower's land.[7] Such security did not increase the lender's rights, however, for he could not retain the property pledged as security for interest beyond that to which he was otherwise entitled,[8] nor did he have any rights to the secured property in the case of maritime loss; the loan was repayable only if ship and cargo escaped the perils of the sea.[9] His advantage lay merely in having additional security against which to enforce judgment if the secured property was lost sea or determined to be of insufficient value.[10] Where classical Roman law fixed the annual interest rate at 12.5 percent for ordinary loans, corresponding precisely with 1 percent per month, the interest rate on maritime loans was unrestricted due to the uncertain duration of the risk.[11]

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[5] "I have been involved in maritime trade for a long time now, and up to a certain time risked the sea in my own person. Almost seven years ago, I gave up voyaging, and having made a moderate sum of money, I try to put it to work in maritime loan (*nautikois ergazethai*)." See Millett, *Lending and Borrowing*, 192. On the sea loan cases Demosthenes mentions, refer to Calhoun, "Sea Loans in Ancient Athens," 565–570; Atkinson, "Rome and the 'Rhodian Sea-Law'," 90.

[6] Chowdbaray-Best, "Ancient Maritime Law," 88–89; Huvelin, *Droit commercial romain*, 215–218; Rougé, *Organisation du commerce maritime*, 345–348; Calvin B. Hoover, "The Sea Loan in Genoa in the Twelfth Century," *The Quarterly Journal of Economics* 40 (1926), 495–496.

[7] Scott, *Civil Law*, 5:222, Digest XXII, 2, 4.

[8] *Ibid.*

[9] *Ibid.* 5:223, Digest XXII, 2, 6.

[10] On the sea loan in the Roman Empire, consult Huvelin, *Droit commercial romain*, 196–215; Rougé, *Organisation du commerce maritime*, 348–360; Letsios, *Das Seegesetz der Rhodier*, 189–190; Ashburner, *Rhodian Sea Law*, ccix–ccxxi.

[11] Scott, *op. cit.*, 5:222, Digest XXII, 2, 3: "In the case of money transported by sea, it is at the risk of the creditor from the day on which it is agreed that the ship will sail." Maritime interest could only be contracted for during the maritime risk, which began on the departure day fixed by the contract, and ended as a rule when the ship came in.

Several articles of the N. N. discussed loans for commercial voyages.[12] As a rule, the lender and borrower were not to put the sea loan agreement into writing in case the latter assured the return of the funds out of property on land not subject to risk; if either or both parties acted otherwise, the contract would be void. But if the loans given on credit to persons traveling by land with a surety and without any risk, they were to be put into writing in accordance with the N. N.[13]

The Rhodian legists, like their Greco-Roman predecessors, distinguished between the interest payable on money lent for land as opposed to sea ventures, and required the borrower to provide security for the latter. The interest rate most probably varied in accordance with the security given, the time during which the money was to remain in the borrower's hands, or some similar circumstance. The interest given to ship owners, seamen and those involved in the shipping business was of two types, *fœnus* or *usura* and *nauticum fœnus*. The former was the ordinary rate of interest for money lent to seamen upon security and without any risk to the lender, while in the latter, higher rate, reflected the absence of security and consequent risk to the lender that the borrower might sustain loss due to the hazards of a sea voyage. In this context, the law allowed for a possible future reduction of the amount of interest in the future. Under adverse circumstances, the loan did not have to be paid off in accordance with the statuary law, particularly if the loss occurred as a result of attack or maliciousness or irresistible force. But, if the borrower did not pay the legal interest, the written agreement would take effect.[14]

Those seamen who could borrow money for a trading venture or a sailing season are mentioned in Article II:19. Not all captains or copartners in a ship could enter into loan agreements, an option restricted to those in actual command who owned not less than

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[12] Demetrios Gofas, "The Byzantine Law of Interest," in *The Economic History of Byzantium from the Seventh through the Fifteenth Century*, ed. Angeliki E. Laiou *et al.* (Washington, D.C.: Dumbarton Oaks Research Library and Collection, 2002), 3:1087–1090; Letsios, *Das Seegesetz der Rhodier*, 193–194. The sea loan is treated in Articles 17, 18, and 19 of Part II, and in Articles 16, 17, and 18 of Part III.

[13] Article II:17; Justice, *General Treatise*, 84; Ashburner, *op. cit.*, 65–67; Letsios, *Das Seegesetz der Rhodier*, 197, 255.

[14] Article II:18; Justice, *General Treatise*, 85–86; Freshfield, *Manual of Later Roman Law*, 206; Letsios, *Das Seegesetz der Rhodier*, 194–197, 255.

three-fourths of the value of a ship. The maritime loan seems to have been given either for a single voyage or for the whole navigation season, from April to late October. In either situation, when the loan came due date, the lender could send an agent to collect it.[15]

A moneylender was entitled to a higher interest rate for a maritime loan than a land loan because of the risk of loss due to sea hazards and of human hostilities.[16] So long as the money was lent at a maritime interest rate, the risk of loss lay solely with the moneylender, who could not contract himself out of it. If the vessel or the goods arrived at port of debarkation, the lender was entitled to collect the amount of the loan and the interest. The lender's risk ceased if, on the due date, the loan was not paid off, or if the money lent was lost after the debarkation of the borrower's cargo, as a result of fire, piracy or shipwreck; in such cases he was entitled to reclaim his entire loan. However, if the loan was contracted with a specific repayment date, it was no longer regarded as a sea loan, and the lender was regarded as an ordinary creditor earning interest at the standard rate. Articles III:16 and III:17 further ruled that the creditor was entitled to attach the debtor's assets on shore if on the due date he failed to appear. If the lender could not obtain repayment for his debt on the designated date, he became the equivalent of a sea loan creditor entitled to the maritime rate for only so long as the debtor was absent on the voyage.[17]

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[15] Ashburner, *op. cit.*, 68–69. Where the lender chose not to receive the loan by himself, but appointed and sent an agent, who could give a discharge for the loan. See Scott, *op. cit.*, 5:222, Digest XXII, 2, 4, 1; 10:128–129, Digest XLV, 1, 122, 1.

[16] Gofas, "Byzantine Law of Interest," 3:1091, 1094. The amount of interest varied from one period to another and probably varied according to the emperors' religious leanings. Certain dynasties prohibited usury on ordinary loans, but fixed a low interest rate on maritime loans. The Ecloga of the Isaurian dynasty, for example, does not refer to the interest rate either on ordinary or maritime loans. Nonetheless, we learn that Nikephoros I (802–811) granted maritime loans at a low rate of 16.66 percent, 4 *keratia* for each *nomisma* of gold. An identical regulation in 1363 or 1364 obliged the debtor to pay 14 *hyperpyra* against the 12 he had borrowed per voyage.

[17] Maridaki-Karatza, "Financing of Trade," 3:1103–1104; Ashburner, *op. cit.*, ccxxii–ccxxiii, 96–97; Freshfield, *Manual of Later Roman Law*, 62–63; Justice, *General Treatise*, 97–98; Dareste, "*Lex Rhodia*," 13–15. Letsios assumes that Article III:16 is quite ambiguous and interprets it as saying that ship owners and shippers could not borrow money for carrying out maritime transactions or paying the freight charges due to the human and natural perils that may emerge in the course of the journey. However, if the land loan were to be used abusively, the borrower would have to repay as if the sum of money was lent as a maritime loan. See Letsios, *Das Seegesetz der Rhodier*, 196.

In the pre-and post-Justinianic eras, the rules governing maritime loans were identical. Moneylenders were almost always merchants involved in maritime trade, who provided loans for all sorts of overseas commercial purposes, as well as emergency services for vessels in foreign ports. As noted, Justinianic laws allowed the creditor to charge a higher rate of interest for a sea loan than one without maritime risk. Moreover, the maritime loan was payable only if the ship/cargo reached her destination safely. In the case of maritime disaster, the contractual relationship between the two parties became void; the creditor's loan was not repaid, nor could the debtor obtain anything for the loss of the value of his pledge over and above the amount of the loan.[18] Upon uccessful completion of the journey or enterprise, a sea loan became due with interest and usually repaid in about twenty days.[19]

Although the Digest and the N. N. outline the legal principles of a sea loan, the minute detail provided by documentary evidence on the rights and duties of the lender and borrower is more informative. As noted earlier, from Demosthenes's time through the second century C.E. and until the high Middle Ages, the basic principles of sea loan contracts did not change. A typical agreement recorded the names of the lender and borrower, the amount of the loan and the rate of interest with a contingency rate, the date of departure and return, the time within which the loan was to be repaid and the consequences of default. It also specified ports of origin and destination, and occasionally the maritime lanes the ship was to follow; the security for both the outbound and return voyages, name of the vessel in which the security was to be carried, and, infrequently, penalty clauses relating to nonperformance.[20]

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[18] Letsios, *Das Seegesetz der Rhodier*, 191–193. Despite its Judaic roots, the critique of usury was most ferverently taken up as a cause by the institutions of the Christian Church. The Church had by the fourth century C.E. prohibited the taking of interest by the clergy, a rule which they extended in the fifth and sixth centuries. Due to the Christian influence there had been several attempts during the Justinianic era—Novella 106 of the year 540 and Novella 110 of 23rd of April 541—to reduce the rate of interest. Despite the religious prohibition, Byzantine legists seemed to have fixed the 12 percent interest rate for the sea loan.

[19] *Ibid*., 193.

[20] Lionel Casson, "New Light on Maritime Loans: P. Vindob G 40822," *Zeitschrift für Papyrologie und Epigraphik* 84 (1990), 195–206; Calhoun, "Sea Loans in Ancient Athens," 570–584.

Documentary and legal materials on the use of the sea loan by Muslims are few and far between, as a result of the religious prohibition against such financing. That prohibition probably stemmed from two sources. First, the sea loan involved a definite risk for the moneylender, and the Prophet Muḥammad "has ordained against risk."[21] Second, and more importantly, the borrower had to pay the *ribā*,[22] if the trading venture succeeded.[23] In spite of this tacit Qur'ānic prohibition, there was considerable disparity between judicial theory and commercial reality. Muslim merchants under certain prescribed circumstances borrowed from non-Muslim moneylenders to finance their maritime enterprises. A twelfth century Italian moneylender named Ser Guglielmo lent Sicilian Muslim entrepreneurs money for short periods on condition that they repaid the loans at a fixed interest rate on the date specified; otherwise, the borrowers would have to bear all financial and legal consequences, as set forth in the contract.[24] Two questions arise. First, did a faithful Muslim under severe financial pressure have the right to borrow money and repay the capital with interest? And second, where did one draw the line between true necessity and deceitful circumvention? Although Islamic law explicitly prohibits all kinds of loans with interest, many Muslim merchants did borrow money from non-Muslim financiers to fund their commercial transactions. Whether or not Muslim lenders provided

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[21] Ṭāher (ed.), *Akriyat al-Sufun*, 20; Schacht, *Introduction to Islamic Law*, 146–147. *Gharar* means uncertainty. Technically it signifies the contract or transaction in which the object of contract or the commodity is not determined for both or either contracting party and thus the contract involves an element of risk and uncertainty. It is also applicable in cases where the gain of one partner in a business is guaranteed but that of the other remains uncertain.

[22] The literal meaning of interest or *ribā* as it is used in the Arabic language means an excess or an increase. In the Islamic terminology, interest means effortless profit or that profit which comes free from compensation or that extra earning obtained that is free of exchange. *Ribā* has been described as a loan with the condition that the borrower will return to the lender more than and better than the quantity borrowed. For divine prohibition against *ribā*, see *Qur'ān* 2:275–281; 3:130. A tradition attributed to the Prophet stating: "Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt; like for like, hand to hand, in equal amounts; and any increase is *ribā*."

[23] The issues of *ribā* and *gharar* in Islamic maritime law are covered in great detail by Noble, "Principles of Islamic Maritime Law," 187–219.

[24] Salvatore Cusa, *I Diplomi greci ed arabi di Sicilia* (Palerme, 1868–1882), 1:502–504; Henri Bresc, "Le marchand, le marché et le palais dans la Sicile des X^{e}–XII^{e} siècles," in *Mercati e mercanti nell'alto medioevo: l'area euroasiatica e l'area mediterranea* (Spoleto: Centro Italiano di Studi sull'alto Medioevo, 1993), 307–308.

maritime loans in the Byzantinian form has not been substantiated. In fact, tenth and eleventh century business letters from the Cairo Geniza make very little mention of maritime loans, perhaps due to the prevalence of partnerships and *commendae*. Research does reveal, however, that Jewish moneylenders and bankers (*jahbadh*s) granted loans for business overseas[25] at a fixed annual rate of 16.66 percent, whereas Muslim financiers and craftsmen lent money to coreligionists and *dhimmīs* at a fixed interest rate, not for business purposes, but "because of sheer want."[26]

Byzantine Chreokoinōnia *and Islamic* Qirāḍ/Muḍāraba (Commenda)

Article III:17 also dealt with another form of investment in maritime trade, known in Greek as *chreokoinōnia*.[27] The *chreokoinōnia* combined the advantages of a loan with those of a partnership, in which one party invested capital (the resident), while the other invested labor (the traveling merchant). Like a loan, it entailed no liability for the investor beyond the sum of investment or the quantity of goods delivered to the agent or manager; and, like a partnership, the risks and profits of the investment were divided between investor and manager. The partnership would be dissolved in the event of the death of a partner, cessation of the business, by mutual consent of the partners, or action at law.[28] Article III:17 states:

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[25] TS 6 J 3, f. 33, a twelfth century maritime loan in which an Italian Jew, Ser Misha'el of Trapani, loans 10 ounces of Dūqī (Norman gold of Messina, minted after 1140), to an Egyptian Jew traveling to Sicily. The loan had to be repaid within a month after the arrival of the vessel in which the debtor and his cargo were transported. See Goitein, *Mediterranean Society*, 1:256.

[26] Goitein, *Mediterranean Society*, 1:252–262. Like Islamic law, the Church forbade Christian creditors to collect usury on loans but recognized the legitimacy of a premium on sea loans, which involved a clear risk for the lender. That premium was never considered interest. See Lopez and Raymond, *Medieval Trade*, 167. The only way for Muslim moneylenders and creditors to evade the religious ban on usury and collect interest on commercial and business loans was to use legal devices (*ḥiyal shar'iyya*). See Schacht, *Introduction to Islamic Law*, 76–85.

[27] The Greek term *chreos* signifies debt, while *koinōnia*, which appears in Articles III:21, III:27, III:28, and III:32 of the N. N. means partnership; *chreokoinōnia*, as established by III:17, came to signify loan in partnership. See Letsios, *Das Seegesetz der Rhodier*, 188.

[28] Edwin H. Freshfield, *The Procheiros Nomos* (Cambridge: Cambridge University Press, 1928), 106–107.

> *A* gives gold or silver for the (needs) of a partnership. The partnership is for a voyage, and he writes down as it pleases him till [the time], when the partnership is to last. *B*, who takes the gold or the silver, does not return it to *A* when the time is fulfilled, and it comes to grief through fire of robbers or shipwreck. *A* is to be kept harmless [blameless] and receive his own again. But if, before the time fixed by the contract is completed, a loss arises from the dangers of the sea, it seemed good that they should bear the loss according to their shares and to the contract, as they would have shared in the gain.[29]

Under the provisions of this Article from the N. N., the *chreokoinōnia* was a quasi partnership in which, as noted, one party provided "gold or silver for the needs of a partnership," while the other's contribution consisted of labor. Should losses result from risks at sea, both partners had to share the losses in accordance with the contract terms; however, if the voyage was successful and profitable, both partners divided the profit proportionate to their shares in the venture, *i.e.*, each partner's share of loss had to correspond to his share of profit.[30] This was the fundamental difference between the *chreokoinōnia* and the maritime loan. In the first, the investor was a partner who collected an agreed percentage of the proceeds if the voyage turned out well. In the other form of financing, risk and losses were borne solely by the financier.[31] Furthermore, Byzantine law required the capital investor to bear medical expenses, if the labor-investor suffered injuries, shipwreck or other damage at sea.[32]

Undoubtedly, maritime trade during this period expanded greatly as a result of use of the *chreokoinōnia.* To meet its day-to-day needs, Byzantine lawyers permitted parties to the *chreokoinōnia* to negotiate

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[29] Ashburner, *op. cit.*, 97. Pryor has modified the final clause of Ashburner's translation and it reads as follows: ". . ., just as it seems right [to receive shares] of the gain, [so] it seems right to assume the losses in proportion to the shares according to the agreements." See Pryor, "Origins of the *Commenda* Contract," 24; Letsios, *Das Seegesetz der Rhodier*, 185–186.

[30] Lopez, "Role of Trade in the Economic Readjustment of Byzantium," 80–81; Letsios, *Das Seegesetz der Rhodier*, 183–185; Maridaki-Karatza, "Financing of Trade," 3:1109–1110; Abraham L. Udovitch, "At the Origins of the Western *Commenda*: Islam, Israel, Byzantium?" *Speculum* 37 (1962), 201–202; John H. Pryor, "The Origins of the *Commenda* Contract," *Speculum* 52 (1977), 23–24. To the best of my knowledge, only A.L. Udovitch and J.H. Pryor have each published two modest though extremely important studies on the origins and relationship between the Byzantine *chreokoinōnia* and Islamic *commenda.*

[31] Maridaki-Karatza, "Financing of Trade," 3:1110–1111.

[32] Freshfield, *Procheiros Nomos*, 104–105.

supplementary legal conditions in order to best advance the objectives of the partnership.[33] This flexibility allowed both partners to determine, by common consent, conditions such as: (a) the financial obligations and entitlements of each, *i.e.* their contributions and the distribution of profits; (b) the amount and currency of the investment (gold or silver); (c) the type and duration of the business venture; (d) its geographical sphere; (e) the type of commodities traded; and (f) the name and type of ship to transport the *chreokoinōnia* goods. Hence, the partners, rather than the state legislative body, fixed the *chreokoinōnia* charters. This was the chief difference, as we shall see, between the Byzantine and Islamic legal systems.

Merchants played a vital role in the economic life of urban societies from pre-Islamic Arabia through the late classical era of Islam.[34] Nonetheless, the *Qur'ān* refers nine times to *tijāra* (merchandise; trafficking) in seven *sūrā*s (chapters), but no mention is made of the term *tājir* (merchant). In addition, Muslim jurists and theologians set forth a series of works—like those of al-Ghazālī,[35] al-Dimashqī,[36] and

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[33] Maridaki-Karatza, "Financing of Trade," 3:1110.

[34] The Prophet Muḥammad himself was a merchant in his early life as were some of his Companions (*ṣaḥāba*), Abū Bakr, ʿUthmān Ibn ʿAffān, ʿAbd al-Raḥmān Ibn ʿAwf, and ʿAmr Ibn al-ʿĀṣ. In fact the rise, development, and expansion of Islam in the Indian Archipelago were effected not by sword, but by trade. In the Islamic context, merchants were often missionaries. The merchants from the Arabian Peninsula planted the seeds for extensive Islamization in years to come. For further details see Patricia Risso, *Merchants and Faith: Muslim Commerce and Culture in the Indian Ocean* (Colorado: Westview Press, 1995).

[35] Abū Ḥāmid Muḥammad Ibn Muḥammad al-Ghazālī, *Iḥyā' ʿUlūm al-Dīn* (Beirut: Dār Ṣāder, 2000), 2:79–111. He laid down seven fundamental principles for a Muslim merchant in his pursuit of profits. A merchant should begin his transactions with good faith and intention; conceive of trade as a social duty; not be the first to enter and the last to the leave the market; avoid forbidden, doubtful and suspicious business; carefully watch his words and deeds in business; not be distracted from fulfilling his religious duties and rituals; and not travel by sea. He also ordered sellers to emphasize the quality and quantity of their commodities and to quote the correct price of the day. Thus al-Ghazālī considers *tijāra* as a form of *jihād*.

[36] Abū al-Faḍl Jaʿfar Ibn ʿAlī al-Dimashqī, *Al-Ishāra ilā Maḥāsin al-Tijāra wa-Ghushūsh al-Mudallisīn fīhā* (Beirut: Dār Ṣāder, 1999). Al-Dimashqī's essay (*Beauties of Commerce*) is a pioneering and more practical manual for merchants, in two parts, one dealing with the merchant and the other with his goods. In the first, he divided merchants in three categories: the wholesaler (*khazzān*, lit. hoarder), who stores goods and sells them when they are scarce and the prices are high; the traveling merchant (*rakkāḍ* lit. peregrinator), who transports goods from one country to another; and the exporting merchant or shipper (*mujahhiz*) who is himself stationary, but sends the shipments to a reliable agent abroad, provided that both parties share the profits. The part on goods concerns the essence of wealth, the way to test the gold, various

Ibn Khaldūn—on the ethics of trade, without discussing the methods Muslim merchants practiced in carrying out their commercial transactions. The latter omission can be attributed to the abundant judicial sources that deal with them. To treat the entire range of such methods is beyond the limited scope of this study; hence, the discussion will focus on maritime *qirāḍ*.

The term *qirāḍ* is one of the three used in Islamic law texts to designate *commenda*, in addition to *muqāraḍa*[37] and *muḍāraba*.[38] By definition, the *commenda* was an arrangement in which the *muqāriḍ* (capital-investor or *commendator*) or group of investors entrusted capital or merchandise to an *ʿāmil al-qirāḍ* (agent, *tractator*, or labor-investor). He used the capital to trade and then repaid to the *muqāriḍ*(s) the principal and a previously agreed upon share of the profits. For his labor, the agent received the remaining share of the profits. Any loss from the exigencies of travel or from an unsuccessful business venture was borne exclusively by the *muqāriḍ*(s); the agent was in no way liable for such a loss: he lost only the time and effort he expended.[39] Only dishonest manipulations or a flagrant breach of

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commodities and their prices, ways of distinguishing bad merchandise from good, crafts and industries, advice to merchants, warnings against tricksters, management of wealth, etc. Like al-Ghazālī, al-Dimashqī pictures the ideal merchant as a God-fearing person who deals equitably, buys and sells on easy terms, carries goods for human needs, and is satisfied with a small profit.

[37] The *qirāḍ* and *muqāraḍa* are derived from *q.r.ḍ*. Literally, it signifies a loan or a piece of property, which a man cuts off from the rest of his property, and, which, itself, he receives back.

[38] *Qurʾān* 2:273: "(Charity is) for those in need, who, in Allāh's cause, are restricted (from travel) and cannot move about in the land (*ḍarb fī al-arḍ*), seeking (for trade or work) . . .'; *Qurʾān* 73:20: ". . . Others traveling through the land seeking of Allāh's bounty (*wa-ākharūna yaḍribūna fī al-arḍi yabtaghūna min faḍli Allāh*); Abū al-Ḥasan ʿAlī Ibn Muḥammad Ibn Ḥabīb al-Māwardī, *Al-Muḍāraba* (Cairo: Dār al-Anṣār, 1984), 98–100; Zakariyyā M. al-Quḍā, *Al-Salam wal-Muḍāraba min ʿAwāmil al-Taysīr fī al-Sharīʿa al-Islāmiyy*a (ʿAmmān: Dār al-Fikr lil-Nashr wal-Tawzīʿ, 1984), 157–160. Thus, the term *muḍāraba* is certainly derived from the *Qurʾān* to designate profit made by an agent by virtue of his effort and work. There are a number of Qurʾānic injunctions and *Ḥadīth*s (Prophetic traditions) that encourage Muslims to engage in lawful, wide-ranging trade and commerce. See Doi, *Sharīʿah: The Islamic Law*, 348–372. Diverse terminology may result from geographical factors, or from the juristic or personal preference of Muslim *fuqahāʾ*. See Udovitch, *Partnership and Profit*, 174; Minhājī, *J̌awāhir al-ʿUqūd*, 2:239.

[39] Abraham L. Udovitch, *Partnership and Profit in Medieval Islam* (Princeton: Princeton University Press, 1970), 170; *idem*, "At the Origins of Western *Commenda*," 198; *idem*, "Commercial Techniques in Early Medieval Islamic Trade," in *Islam and the Trade of Asia*, ed. by D.S. Richards (Oxford: Bruno Cassirer, 1970), 47; *idem*, "The 'Law

any legitimate stipulations of the *qirāḍ* agreement by the agent would make him responsible for the full amount of the investment.[40] This basic arrangement was used in *commenda* carried out on land as well as at sea, and the basic structural features of it as well as the relationships between its principal parties, were similar in all Islamic schools of law due to their common origins.[41] Controversial legal opinions on the subject are, therefore, few and probably appear to reflect the personal attitude of the individual jurists.

Writing a *commenda* contract, although preferable, was not mandatory in Islamic law, if the partnership between the *muqāriḍ* and his agent was based on mutual trust and good faith. However, if the parties intended to document their contract, jurists advised them to have a notary compose it and witnesses testify to it, in order to avoid any later legal altercations. Both parties, chiefly the *muqāriḍ*, had to define whether the contract was a limited mandate or an unlimited mandate *commenda*,[42] the amount of the investment, provisions for dividing profits, and the agent's authorization to trade.[43] Al-Ṭaḥāwī's (239–321/852–933) instructions to Muslim notaries, *muqāriḍ*s and agents illustrates the proper formulation and implementation of a *commenda* contract:

Merchant' of the Medieval Islamic World," in *Logic in Classical Islamic Culture*, ed. G.E. von Grunebaum (Wiesbaden: Otto Harrassowitz, 1970), 115–116; Doi, *Sharīʿah*, 348, 366–367; Quḍā, *Al-Salam wal-Muḍāraba*, 159–160.

[40] Udovitch, "At the Origins of Western *Commenda*," 205.

[41] Udovitch, *Partnership and Profit*, 176.

[42] In an unlimited *commenda* contract, the agent is authorized to act completely on his own discretion and judgment in all business affairs. He may purchase and sell all kinds of goods as he sees fit; carry out transactions for credit or cash; employ helpers; hire and purchase any means of transport and equipment; travel with the capital; mingle the investor's capital with his own resources; give a *commenda* and invest it in a partnership with a third party; and lastly, pledge or deposit the goods with another person. By contrast, in the limited *commenda*, the agent was restricted, first and foremost, by the customary practice of the merchant not to speak about the limitations imposed by the investor in the verbal or written contracts. The investor might not permit the agent to sell *commenda* goods on credit; entrust the goods or capital with outside parties; invest them in a *commenda* or partnership with a third party; leave them as a deposit; or engage in other commercial activities without the investor's explicit authorization. Furthermore, the agent might be forbidden to travel beyond the agreed localities, by sea, or after sunset. Acting otherwise made the agent responsible for the losses. See Udovitch, *Partnership and Profit*, 203–215; Māwardī, *Al-Muḍāraba*, 130–132.

[43] Udovitch, *Partnership and Profit*, 196–198.

If a man gives to another money as a *commenda* on condition that the agent works with it in any field of trade that he (the agent) sees fit, and in any city that he wishes to, and on condition that whatever profit God grants them in this matter be shared between them equally, and both wish to draw up a document between them in this matter, then he (the notary) writes: 'This is a document stating that to which the witnesses named in this document testify. They all testify that *fulān* and *fulān*, whose identity they have ascertained and whom they know in a manner that is legally sound. . . .' Then the scribe should arrange the contract by inserting the various formulae until he finishes writing the first date. Then he should write:

Fulān, the person named in this document, handed over to *fulān*, also named in this document, one hundred uniform *dīnār*s of standard weight, in gold, minted coin of good alloy on the basis of a valid and sound *commenda* on condition that:

a. This *fulān* (the agent) may use it to buy any and all categories of trading goods as he sees fit, in any and all places he sees fit.
b. He may pay the price of anything he buys in this regard from the money mentioned in this document.
c. He may sell these goods or any part of them that he sees fit, for whatever he sees fit, either for cash or credit in any and all places that he sees fit.
d. He may take possession of the price of what he sells in this regard, and may deliver what he sells to the one to whom he sold it.
e. He may hire in this regard whomsoever he sees fit, to go wherever he sees fit on land and on sea, and he may pay, as he sees fit, the wage of whomsoever he hires in this regard from the money mentioned in this document and from that which he might profit by virtue of the *commenda* mentioned in this document.
f. He may administer the capital in this fashion, and dispose of the funds that may come into his possession and the funds accruing from that which he sells just as he could freely dispose of them previously (*i.e.*, prior to the purchase and resale of *commenda* goods), by virtue of the *commenda* agreement mentioned in this document.
g. From whatever profit God grants from this money by virtue of *fulān*'s (the agent's) activities with it within the *commenda* agreement, the agent will hand over to *fulān* the investor his investment, after payment of any debts that he, the agent named in this document, may have incurred on account of the *commenda* agreement, mentioned in this document.

Whatever profit which God may have granted on the money mentioned in this document is to be shared between the two of them in so many and so many shares. To *fulān* (the investor) from this sum, by virtue of his capital mentioned in this document, *X* shares from the total number of shares; and to *fulān* (the agent) from this sum by

virtue of his time and effort expended on it, *Y* shares from the total number of shares mentioned in this document.

And *fulān* (the investor) handed over to *fulān* (the agent) the entire amount of *X dīnār*s mentioned in this document, and *fulān* (the agent) took possession of them from him. They were transferred into his possession during the session in which the two of them concluded the *commenda* agreement mentioned in this document and before the two parties separated from one another physically. This was done on the condition that *fulān* (the agent) will conduct himself in a God-fearing manner with respect to that which was entrusted to him in the *commenda* mentioned in this document, and that he will act in a trustworthy manner with it, and that he will be zealous with it, and that he will generally conduct himself in accordance with what God's precepts demand. For God, may He be exalted and magnified, will not diminish the reward of one who does good works.

Then he (the scribe) writes:

This document was written in two copies.

And after that he mentions the testimony for the investor and for the agent, in a manner similar to that which we described earlier in a previous passage of this book, until he finishes writing the date with which the document concludes.[44]

The regulations pertaining to the *muḍāraba* on sea were thus identical to those on land. Five cardinal principles can be gleaned from the foregoing excerpt with regard to a valid maritime *commenda* contract. First, the *muqāriḍ* had to specify the sum of the investment to his agent, who would use it to make a profit for the partnership. Second, the share of each party from the anticipated profit had to be specified as a percentage or ratio. In an unsuccessful *commenda*, the financial loss would rest entirely on the *muqāriḍ* with the agent losing nothing but his labor. Where there was neither loss nor profit, the agent would receive no pecuniary reward for his efforts. Third, the *commenda* agreement was binding not at the moment it was signed, but when the *muqāriḍ* handed the capital (*ʿayn*) over to his agent, at which point the *commenda* took effect.[45] If the agent chose not to

[44] Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 2:726–731. The English translation of the text is taken from Udovitch, *Partnership and Profit*, 198–201.

[45] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:243–245; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 12:319–322; Khushanī, *Uṣūl al-Futyā*, 152; ʿAlı ʿA. ʿAbd al-Raḥmān, *Al-Muḍāraba fī al-Fiqh al-Islāmī* (Cairo: Dār al-Hudā, 1980), 5–6. In principle, Islamic law schools tend to accept minted coins only, such as gold *dīnār*s, silver *dirham*s and circulated copper coins, for the investment in a *commenda*; com-

accept all of the capital specified in the original agreement, he could be held liable only for the amount delivered to him pursuant to the *commenda*. Fourth, except in a limited-mandate *commenda*, the agent was free to trade wherever he saw fit with the capital entrusted to him in order to make a profit. Ultimately, the duration of the partnership was neither predetermined nor limited. Either the *muqāriḍ* or the agent was entitled to terminate it by providing reasonable notice to the other,[46] usually only after the *commenda* had been in effect for one year, a limitation intended to minimize the negative effect of such a termination on commerce.[47]

Due to natural and manmade risks,[48] a small number of jurists disfavored, although still allowed, overseas trading ventures for profit.[49]

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modities (*ʿurūḍ*) and unminted silver and gold, were inadmissible. See Māwardī, *Al-Muḍāraba*, 109–119; Udovitch, *Partnership and Profit*, 176–183.

[46] Abū Bakr Muḥammad Ibn Muḥammad Ibn ʿĀṣim, *Iḥkām al-Aḥkām ʿalā Tuḥfat al-Aḥkām* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), 212.

[47] Māwardī, *Al-Muḍāraba*, 126–137; Khushanī, *Uṣūl al-Futyā*, 153; Noble, "Principles of Islamic Maritime Law," 83–84.

[48] Sea travelers and crew were exposed to sudden hazards like storms, shoals, reefs and rocks, pirates and hostile navies, which could render the trading voyage impracticable.

[49] An early tradition indicates that maritime journeys were restricted to those intending to perform the *Ḥajj* or those on military expeditions: "No one should sail on the sea except the one who is going to perform pilgrimage [*Ḥajj*] or minor pilgrimage [*ʿUmra*] or the one fighting in Allāh's path, for under the sea there is a fire, and under the fire there is a sea." Certain legal works even disliked undertaking maritime voyages for commercial purposes. However, their view should not be interpreted as a religious prohibition against sea travel for commercial purposes. This view is affirmed in the *fatāwā* collection of Ibn Taymiyya (663–728/1263–1328), who, when asked whether a merchant who died at sea is considered a martyr, answered: "Yes, he is considered a martyr if he sailed at the appropriate time. The Prophet, peace be upon him, said: 'The drowned person, the burnt person, the person who died of pestilence, the woman who died in the postpartum period, and the person whose house collapsed are considered martyrs.' Traveling by sea was approved as long as safety measures were taken. However, sailing under unfavorable conditions was prohibited. "Whoever does so is looking to kill himself. Such a person would not be called a martyr [*shahīd*], God knows best." Ibn Taymiyya, *Fatāwā*, 24:293. Ibn Taymiyya's response might have been based on Qur'ānic verses that encourage international commerce. *Sūra* 16, verse 14 states: "It is He Who has made the sea subject, that ye may eat thereof flesh that is fresh and tender, and that ye may extract therefrom ornaments to wear, and thou seest the ships that plough the waves, that ye may seek [thus] of the bounty of Allāh and that ye may be grateful." On the importance of water, seas, and oceans in the *Qur'ān* see Muhammad Abdel Haleem, *Understanding the Qur'ān: Themes and Style* (London: I.B. Tauris Publishers, 1999), 29–41. For further details on Islam and the sea, see my *Islamic Maritime Law*, 1–10; Xavier de Planhol, *L'Islam et la mer: la mosquée et le matelot, VII^e–XX^e siècle* (Paris: Librairie academique Perrin, 2000); a review on Planhol's study was published by Lawrence I. Conrad, "Islam and the Sea: Paradigms of

A group of North African jurists ruled that, even in the case of an unlimited-mandate *commenda*, the agent could trade in all regions, except for places that were accessible by nautical craft only. In order to trade at such places, the agent needed the *muqāriḍ*'s permission to sail across the sea.[50] Yet, another legal opinion strictly prohibited the agent from traveling by sea with the capital entrusted to him by the *commenda*. Advocates of the this viewpoint ruled that the agent had no right to travel with the capital without the *muqāriḍ*'s permission. If he did so, he would become liable for any loss of the capital. Even if he obtained the *muqāriḍ*'s permission he was prohibited from traveling by sea unless he guaranteed the capital.[51] In other words, the agent was permitted to trade anywhere that seemed fit to him, but he would do well to trade only where he was professionally familiar with the marketplace. A third group of jurists allowed agents to travel with the capital on land and sea without geographical restrictions.[52] A last line of rulings authorized the agent to travel wherever he saw fit, unless the *muqāriḍ* expressly limited his movements to specific regions or towns.[53]

Unforeseen and unavoidable human hostilities and adverse natural conditions could spur a skillful agent to disregard the *commenda* mandate and act on his own discretion. Judicial authorities provided guidance to entrepreneurs about the proper actions to take in the face of concealed or patent human dangers either before setting sail or en route. In essence, the law forbade the agent to venture into places considered politically unsafe or undesirable.[54] It required the

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Problematics," *Al-Qanṭara* 23 (2002), 123–154. The apprehension of sailing on the high seas was not confined to a specific culture, society or religion. On the contrary, experienced seamen and communities living on or near coasts feared the sea. On the apprehension of Byzantine seamen and travelers regarding sea voyages, refer to George Dennis, "Perils of the Deep Sea," in *Novum Millennium: Studies in Byzantine History and Culture in Honor of Paul Speck*, ed. C. Sode and S. Takàcs (Aldershot, 2000), 65–74; M.E. Mullett, "In Peril on the Sea: Travel Genres and the Unexpected," in *Travel in the Byzantine World*, ed. Ruth Macrides (London: Variorum Prints, 2002), 259–284.

[50] Shammākhī, *Al-Īḍāḥ*, 4:15.

[51] Badr al-Dīn Muḥammad Ibn Abū Bakr Ibn Sulaymān al-Bakrī, *Al-Iʿtinā' fī al-Farq wal-Istithnā'* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1991), 2:663–664.

[52] Shammākhī, *Al-Īḍāḥ*, 4:15.

[53] Māwardī, *Al-Muḍāraba*, 146–148; Ibn ʿAbd al-Barr, *Al-Kāfī*, 2:774.

[54] Idris, "Commerce maritime," 230. The author draws the reader's attention to an investor who signed a limited mandate *commenda* with an agent and specified a particular city and its surroundings, provided that he avoids dangerous areas.

contracting parties, the agent in particular, to inform themselves of the dangers at a possibly hostile port prior to sailing or before reaching the destination if the ship had already set sail. *Muqāriḍ*s and agents could avoid liability for loss due to personal negligence, as long as specific precautionary measures were observed.[55]

When the cargo was loaded in a ship, the responsibility for its safety was equally that of the carrier and shipper, if the latter accompanied it. Neither could act without previously consulting the other. For instance, a shipmaster could not divert the vessel's course, anchor at ports not specified in the leasing contract, or insist upon sailing to unsafe destination. If the shipmaster did anchor in an unsafe port, without previously consulting all those involved in the venture, he would have to remunerate the aggrieved shippers and passengers. The amount of compensation consisted of the difference in taxes between those in the port and the standard rate, if the governor at the foreign port levied higher tariffs,[56] or the value of the goods, if the shippers objected to docking at unsafe port and their cargo was confiscated. Otherwise, the shippers were accountable for the safety of their shipments. The agent had to have prior knowledge of dangers *en route* and at the destination. If a calamity unexpectedly befell the destined port, he had to arrange with shipmaster to alter course and avoid danger.[57] It followed that the liability for loss of capital would shift to the agent in the event of intentional damage or exposure to foreseeable risks.[58]

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[55] Wansharīsī, *Al-Miʿyār*, 8:204–205. If the investor had prior knowledge that the designated place was unsafe but nonetheless instructed his agent to sail for it, the former was liable for loss of capital. However the agent becomes a guarantor for the loss if he knowingly sailed for an unsafe port. Other jurists, like al-Kindī, ruled that if the shipmaster and those on board anchored unknowingly at an unsafe port and the local *sulṭān* arrested them and gave the *commenda* agent the option of delivering the capital or death, the agent must not obey the *sulṭān*'s but protect the capital. This "merciless" legal opinion conveyed the message that even *in extremis*, agents must not abandon a *commenda* or give it away. On the contrary, *commenda* capital was a trust to be safeguarded with their lives. See Kindī, *Al-Muṣannaf*, 18:60.

[56] Ṭāher (ed.), *op. cit.*, 27–28; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ẓiyādāt*, 7:102; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228–229; Qarāfī, *Al-Dhakhīra*, 5:485–486; Wansharīsī, *Al-Miʿyār*, 8:300, 306; Shammākhī, *Al-Īḍāḥ*, 3:580–581. For further details, see chapter three, pp. ?

[57] Ṭāher (ed.), *op. cit.*, 20; Raṣṣāʿ, *Sharḥ Ḥudūd Ibn ʿArafa*, 2:526; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:526; Wansharīsī, *Al-Miʿyār*, 8:302–305.

[58] Udovitch, "At the Origins of the Western *Commenda*," 205.

The law exempted agents (*tractator*s) from liability for loss of the *muqāriḍ*s' capital due to *force majeure*.[59] Adverse climatic conditions were always the most formidable peril to seamen and shippers as these conditions could force them to jettison part or all of a ship's content when foundering became imminent. Irrespective of how the decision was made, and what and whose cargo was jettisoned, the *commenda* agent was not responsible for goods cast into sea in time of peril. Kindī states: "If the sea became agitated and the seamen jettisoned their possessions, the *commenda* agent should cast overboard an equivalent proportion of the goods at his disposal provided that the jettison aims to save lives on ship; he is not held liable to the *muqāriḍ* for loss of the capital."[60] Once jettison took place, all on board had to share the forfeitures, *i.e.*, those whose goods were damaged or lost in part or in their entirety, became co-owners with those whose goods remained intact, proportionate to the value of the jetsam.[61] Accordingly, the *muqāriḍ* was liable for all loss due to an act of God that was not the fault of the agent.

Beside working with other experienced agents who did not own property, some *muqāriḍ*s chose to enter into *qirāḍ* contracts with shipmasters and crews who knew the business of trading.[62] The *muqāriḍ*s' preference for seamen as agents may have resulted from the seafarers' familiarity with commercial hubs, market prices, and the commodities in demand. The real interest of the *muqāriḍ*s and their agents was in the highest possible proceeds from the capital. These could not be gained without (a) bringing the goods intact to the debarkation port in time to take advantage of a favorable market; and (b) properly equipping the vessel with rigging and nautical instruments. The seamen's nautical knowledge enabled them to schedule the departure, choose the itinerary and navigate in the safest and most economical maritime routes. In addition, one may surmise that seamen as agents might have discounted a percentage of the freight in the final accounting.

The A. S. refers to three cases of maritime *qirāḍ*s, in which *muqāriḍ*s and/or ship owners placed funds with a shipmaster and crew. The

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[59] Rajab, *Qānūn al-Baḥrī al-Islāmī*, 279.
[60] Kindī, *Al-Muṣannaf*, 18:60.
[61] See above, chapter four, pp. ?
[62] Wansharīsī, *Al-Miʿyār*, 8:205, 207–208, 306–307.

first concerns a *muqāriḍ* who offered trading capital to partners in a vessel, on condition that whatever profit they derived was to be divided equally between the *muqāriḍ* and the agents. Although the *muqāriḍ*'s offer sounded licit, the law did not sanction it, because his proposition would have resulted in payment of the shipping charges by his co-adventurers, who happened to own the vessel. If they were not acting as the *muqāriḍ*'s representatives or agents, but as trustees of the ship, they would be entitled to wages for their labor, as well as equitable freight for transporting the goods.[63]

Another case deals with a person who offers a quantity of *dīnārs* and a vessel to a master and crew, stipulating that whatever profit they made would be shared, two-thirds for him and one third for them. Ashhab Ibn ʿAbd al-ʿAzīz al-Qaysī (145–204/762–819) ruled on this issue stating: "The contract is void if they have not yet commenced work. However, if they have initiated labor, they would be owed a comparable freight for leasing the ship, while the *dīnārs* would be equally distributed between them in the form of *qirāḍ*."[64] Thus, Islamic law prohibited lumping means of transport and capital together in one deal in the form of *qirāḍ*.

The third legal altercation adjudicated by Abū Muḥammad Ibn Abī Zayd concerned an individual, who contracted a *qirāḍ* with the master of a ship, on the condition that he purchase goods from a town, convey them free on board his vessel, and share the profits equally between them. The jurist's response rendered this *qirāḍ* illegal due to the additional proviso imposed on the agent. He ruled that the agent should receive an equitable wage and the shipping fee for transporting the goods; the *muqāriḍ* alone would receive the profit or bear the loss.[65] In other words, the ship could be an integral part of a *commenda* partnership, but the freight could not be part of the transaction.

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[63] Ṭāher (ed.), *op. cit.*, 47.

[64] *Ibid.*; Wansharīsī, *Al-Miʿyār*, 8:205.

[65] Ṭāher (ed.), *op. cit.*, 48; Wansharīsī, *Al-Miʿyār*, 8:205, 306–307. As demonstrated above, violation of the conditions of the *qirāḍ* abrogated the contract, provided that its execution had not commenced, and the parties were regarded as though they had not contracted. If, however, commercial transactions had already begun, the defective *qirāḍ* was transformed into a hire service, where the agent becomes a wage earner entitled to fair remuneration. By contrast, medieval European lawyers saw the ship as an inseparable part of the *commenda* deal. See Lopez and Raymond, *Medieval Trade*, 181–182.

The rules governing a *commenda* in which the *muqāriḍ*s offered capital to the master and crew of a ship, can be summed up as follows: The master and crew, as agents, collected the investment capital before they actually commenced transactions as trustees. They maintained it as a trust, and thus had to take care of it and return it when demanded by the *muqāriḍ*s. However, they would be absolved of liability if they lost the capital unintentionally. The master and crew were agents of the *muqāriḍ*s, legally responsible for the acts and contractual obligations they carried out within the bounds of their authority. They were also entitled to a fixed share in the profit, as profit-sharing was the purpose of this partnership, but they could be held liable if they did not respect the contract terms. If the contract became void, they would receive an equitable wage for their labor, while the capital-investor alone enjoyed the profit or bore the loss. If the entire profit was earmarked for the investors, the crew would be entitled to a portion of goods in exchange for their labor, but not to remuneration. Conversely, if the entire profit was to go to the crew, then the transaction would be regarded as a loan and they would have the right to the entire profit, but would also bear any loss and would still have to repay the loan to the investor.[66] The law also required the *muqāriḍ* to pay equitable freight to his agents if they transported the goods aboard their own vessel, provided that the loss was borne solely by the investor; otherwise, the law categorized them as wage earners.[67] *Commendae* proceeds, then, were not divided in accordance with norms established by law. Rather, contract provisions were deemed legal so long as they did not contradict Islamic sacred law.

Commenda expenses consisted of freight costs, passage fees, custom duties and taxes, the salaries of hired helpers, and the agent's living expenses. The agent had the right to deduct all legitimate business expenses from the *commenda* fund, except when the transaction was

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[66] Noble, "Principles of Islamic Maritime Law," 84–85.

[67] Mālik Ibn Anas, *Al-Muwaṭṭaʾ of Imām Mālik Ibn Anas*, trans. by Aisha Abdurrahman Bewley (London: Kegan Paul International, 1989), 283; Māwardī, *Al-Muḍāraba*, 149–163; Noble, "Principles of Islamic Maritime Law," 89. Three factors could invalidate the *commenda* transaction and treat it as mere hiring: if either party stipulated a fixed sum instead of a percentage of the proceeds., or if the agent bore liability for loss (except for loss through negligence) or if it was stipulated that the agent was to use or hire a ship belonging to the *muqāriḍ*, so that fictitious hire of the ship became part of the profit.

carried out in his native town.[68] Even if the agent completed a journey on behalf of the *commenda* without buying any goods or otherwise investing the capital, his travel and personal expenses would nonetheless be covered from the capital; the quality of his food, clothing and accommodations was determined by the agent's social status.[69] In addition to these expenses, the fathers of Islamic jurisprudence recognized unusual but necessary expenditures, such as the *barṭīl* (gratuity or bribe), as legitimate expenses. Shippers paid the *barṭīl* to tax collectors, government officials, port superintendents, porters and seamen, in order to: (a) protect the investment from harm and confiscation and (b) to accelerate loading, discharge, release and storage processes at embarkation and debarkation points.[70]

Upon return to the home port with the *commenda* proceeds, legal altercations and claims could arise between a *muqāriḍ* and his agent when the truth of the agent's accounting was in doubt. If the *muqāriḍ* sued on the grounds of financial fraud, the agent could defend himself by taking an oath and presenting documentary evidence in his support. In principle, Islamic law credited the agent's oral deposition under oath, if the *muqāriḍ* could not prove the contrary.[71] Moreover, the agent could substantiate his testimony with commer-

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[68] The agent had the right to begin commercial transactions while still in his native port city, provided he covered expenses for his food, clothing and others needs for himself rather than through the *commenda* fund. See Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:260–263.

[69] Mālik Ibn Anas, *Al-Muwaṭṭa'*, 284; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:260–263; Khushanī, *Uṣūl al-Futyā*, 153, 154; Ibn al-Jallāb, *al-Tafrī'*, 2:194–195; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 12:325–326, 334–335, 350–351, 400–401; Ibn ʿĀṣim, *Iḥkām al-Aḥkām*, 212; Udovitch, *Partnership and Profit*, 230–234; Idris, "Commerce maritime," 231–234; Rajab, *Qānūn al-Baḥrī al-Islāmī*, 267–268.

[70] Idris, "Commerce maritime," 237–238; *idem*, *Berbérie orientale*, 287–288; Abdelaziz Kh. Temsamani, "Al-Tijrāra al-Baḥriyya fī Ḥawḍ al-Baḥr al-Mutawassiṭ min khilāl Nawāzil Abī al-Qāsim al-Burzulī," in *L'occident musulman et l'occident chrétien au moyen age*, ed. Mohammed Hammam (Rabat, 1995), 170–173; Udovitch, *Partnership and Profit*, 234–235; Goitein, *Mediterranean Society*, 1:542; *idem*, "Additional Material from Ibn ʿAwkal Archive on the Mediterranean Trade Around 1000," *Tarbiz* 38 (1968) (Hebrew), 32–36, 182–183, Bodl. MS Heb. d. 65, f. 17, l. 4. On the payment of gratuity to seamen and porters in the realm of Islamic Mediterranean, see above chapter two, notes 103–106.

[71] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:283–293; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 12:387–397; Ibn ʿĀṣim, *Iḥkām al-Aḥkām*, 212; Wansharīsī, *Al-Miʿyār*, 8:206–207; Idris, "Commerce maritime," 234. The *Imām* al-Māzarī (d. 536/1141) ruled: "The agent (*ʿāmil al-qirāḍ*) is believed upon his oath. However, if he supports his claims with solid evidence, he will be absolved from taking an oath."

cial accounts of his dealings with the *commenda*.[72] Known in Arabic and Geniza manuscripts as a *daftar* (lit. a ledger), this bookkeeping device itemized the agent's business and personal expenditures. A merchant or his agent recorded the shipments received, sales and purchases made, goods or cash or both shipped, and the balances outstanding for every commercial season. This inventory, widespread during the second century A.H./eighth century C.E. in the Muslim world, was considered circumstantial evidence in Islamic civil and religious courts.[73] Besides the *daftar*, judges probably considered written documents such as bills of lading, merchants' letters, and receipts. Once the *commenda* transaction and the final accounting were completed, the *muqāriḍ* and agent had to declare the agreement null and void. The *muqāriḍ* pronounced the agent free and clear of all obligations and promised not to sue further for anything regarding the *commenda*.[74]

Commercial activities not only impacted the economy and court systems, but also social and familial spheres. Specifically, women did not normally accompany their husbands abroad on commercial ventures and were left behind for long periods of time to take care of their immediate family, which in turn effected conjugal relations. Many *nawāzil* cases and judicial inquiries describe at length the legal status of wives of warriors and merchants, whose husbands remained away for prolonged periods without contacting their families. A decree issued by ʿAbd Allāh al-Rāʾis, known also as ʿAbd Allāh Ibn Ṣadaqa al-Anṣārī, dissolved marriage ties if a man stayed away from his wife longer than four months without sending adequate means to support her or sailed aboard the governor's vessel to al-Mahdiyya or Zuwayla and did not return home.[75] Another decree on the legal status of a deserted wife[76] was issued by the *qāḍī* of Gafsa. The wife

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[72] Idris, "Commerce maritime," 231–232; *idem*, *Berbérie orientale*, 287, note no. 58; Temsamani, "Al-Tijrāra al-Baḥriyya," 170–173.

[73] TS 10 J 29, f. 5, ll. 16–19; TS 13 J 17, f. 11, ll. 8–14; TS 13 J 17, f. 11, l. 10; Bodl. MS Heb. a 3, f. 13, ll. 44–46; Goitein, *Mediterranean Society*, 1:205–207; Udovitch, *Partnership and Profit*, 237–238; Vincent Lagardere, "Le commerce des céréales entre al-Andalus et le Maghrib aux XI^{e} et XII^{e} siècles," in *L'occident musulman et l'occident chrétien au moyen age*, ed. Mohammed Hammam. (Rabat, 1995), 146–147.

[74] Minhājī, *Ǧawāhir al-ʿUqūd*, 1:246.

[75] Wansharīsī, *Al-Miʿyār*, 3:311–312, 338–339; Idris, *Berbérie orientale*, 285.

[76] Our reference here is to a wife, whose husband had disappeared without divorcing her. In Jewish *halacha* she is called *ʿagonah*.

of a Gafsian named Aḥmad, who for six years had not returned from Andalusia, appealed to the local judge for a divorce. The *qāḍī* gave an extension to the missing husband before finally pronouncing them divorced. He issued two copies of the decree (*ḍarbān*), one to the office of the *qāḍī*'s clerk (*Dīwān al-Aḥkām*) and the other to the petitioner. It was read out in the courthouse (*Majlis al-Qaḍā'*), in the *qāḍī*'s presence before witnesses.[77] Such socioeconomic and legal effects on the families of absent husbands are documented in many letters, marriage contracts and court records from the Cairo Geniza.[78]

Summary

Initially, the sea loan was the predominant form of financial transaction supporting trade in the Byzantine Empire. Typically, a traveling merchant or a ship owner used such a loan to fund trading transactions for the duration of a specific journey, usually for a round trip. The advance was made in cash, and repayment was contingent on the safe arrival of the goods or of the ship in question. The time within which the loan was to be repaid was set forth in the agreement and took into consideration natural, human and market factors. The loan was repaid within a month at the most after safe arrival at the port of debarkation, which enabled the borrower to sell his goods. The lender bore the casualty risk but not the business risk; the borrower had to repay the loan, even if his trading proved unprofitable. Historical evidence for the origin of the sea loan proves without doubt that it derived from Athenian commercial law. Its basic principles survived without significant changes from the fourth century B.C. through the high Middle Ages.

The practice of financing trading voyages through sea loans seems to have existed in Islamic territories around the Middle Sea. Documents from the Cairo Geniza prove that Muslim traders borrowed money from Jewish lenders to finance domestic and overseas commercial dealings. A similar practice existed among Muslim traders living in

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[77] Idris, "Commerce maritime," 229; *idem*, *Berbérie orientale*, 295. For further ideas on this topic, refer to Wansharīsī, *Al-Miʿyār*, 3:37–41, 111–113, 202, 285–290, 293, 302–303, 313–315, 319–320, 327–331, 407; 4:19–20, 41–42.

[78] Goitein, *Mediterranean Society*, 3:189–223.

Christian kingdoms, despite the double explicit religious prohibition. Loans for maritime ventures were made according to Greco-Roman norms, though on a very limited scale, in the Muslim world.

Pryor argues that the origins of the *commenda* go back to the Roman *societas* but admits that no direct link has been traced.[79] However, he attempts to associate its origins with the Byzantine *chreokoinōnia* and states: "It seems reasonable that a Byzantine institution such as the *chreokoinōnia* might have been the connecting link between the *societas* of labor and capital and the *commenda*."[80] The evidence for *chreokoinōnia* is extremely scanty. There are no surviving written contracts and very little corroboration for it in the N. N. One brief clause on the *chreokoinōnia* in Article III:17 of this codification may have constituted a precedent for it, but it is doubtful whether it laid the legal foundations for the development of the Western maritime *commenda*.[81] By the turn of the second century A.H./eighth century C.E., however, when the major Muslim schools of law were founded and 50 percent of the Mediterranean lay within the Caliphate domain, the edicts issued by the fathers of Islamic law were followed in the Islamic territories. The great majority of the *commenda* rules, set forth by *imām* Mālik Ibn Anas in his *Muwaṭṭa'* (Chapter 32), cannot be found in any Byzantine legal source. Indeed, Byzantine judicial literature remained silent on the role of ship owners as *tractator*s. Based on the available written evidence from the Mediterranean world, one may infer that the Islamic *qirāḍ* system was much more developed than the Byzantine *chreokoinōnia*. This conclusion affirms Udovitch's hypothesis arguing that the earliest form of the Western *commenda* may have been based on the Islamic *qirāḍ*. Lopez, too, posits that the Western *commenda* contract "developed first in the seaports of Byzantine Italy between the late eighth and the early tenth century under the direct influence of the oriental commercial contracts (Byzantine *chreokoinōnia* and Muslim *muḍāraba*)."[82]

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[79] A *societas* required both parties to the contract to invest capital in the venture; the capital investor contributes two-thirds of the capital and the labor investor one-third, provided the profit was evenly divided between them. The distribution of profits in western *commenda* differed slightly for the capital-investor collected three-quarters of the profits, the *tractator* the remainder. See Constable, *Trade and Traders*, 72.

[80] Pryor, "Origins of the *Commenda*," 37.

[81] Letsios, *Das Seegesetz der Rhodier*, 183, considers the *chreokoinōnia* as the forerunner of the Medieval European *commenda*.

[82] Lopez, "Trade of Medieval Europe," 267; Constable, *Trade and Traders*, 71.

CONCLUSIONS

The great majority of legal historians and lawyers make the questionable assumption that the N. N. exclusively governed carriage by sea in the Mediterranean from the seventh until the early eleventh century. To comprehend the extent to which Mediterranean seafarers recognized the N. N., it is imperative to consider historical developments between the early seventh and the ninth century. As Ashburner has concluded, the N. N. could have been promulgated neither prior to 600 nor later than 800,[1] a period during which Byzantium lost control over most of its Mediterranean provinces. From 610 until early 628, Byzantium struggled for its life as the Persians took over the eastern provinces, endangering the capital of the empire itself in 626. A few years later, when constant wars between the two superpowers, Byzantium and Persia, weakened both militarily and financially, Muslims took advantage of the political vacuum so that during the Early Caliphate (Rāshidūn), the Persian (Sassanid) Empire ceased to exist, while the eastern territories of Byzantium shrank, leaving only Asia Minor: Syria, Egypt, and North Africa were lost to the Muslims. Consequently, placing the promulgation of the N. N. in the seventh century, especially in its first half, raises serious questions.[2]

Apart from the *lex Rhodia de jactu*, treated separately under Digest XIV, 2, the laws governing carriage by sea in the Mediterranean before the seventh century were dispersed among different books and

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[1] Again, the promulgation of the N. N. is questionable. Some contemporary scholars led by Freshfield argue that the collection in its current form was enforced by the Isaurian dynasty in the eighth century. The dynasty that revived the Byzantine naval and commercial activities for a century could well have ordered the propagation of the N. N. that governed shipping in Byzantium. Other theories presented by Schminck show that this treatise originated during the latter half of the ninth century and was an original part of the Basilika.

[2] Following the defeat of Byzantium in the Battle of Masts (34 A.H./654–5 C.E.), Islamic naval powers launched maritime attacks against Byzantine targets on the Aegean and Mediterranean between 51/672 and 61/680, and sacked Constantinople. Meanwhile, Islamic armies were proceeding by land towards the central and later towards the western territories of Byzantium in North Africa.

subjects in the Justinian Corpus Juris Civilis. Justinian's legal compilation and Code were promulgated on the North African mainland immediately following its re-conquest from the Vandals in 534, and were in force until the last Byzantine bastion Septem (Ceuta) fell to the Arabs in 702. Justinian's laws were enforced on most of the islands in the western Mediterranean—Sardinia, Corsica, the Balearics, and Sicily in particular—until the ninth century. Egypt, however, is a unique case. In addition to the imperial laws, the Church of Alexandria played an integral role in the shipping and maritime industry and regulated river and sea navigation according to laws of its own prior to and through the Islamic era.[3] The Christian Arabic Ecloga, an Arabic version of the Greek Ecloga from the first half of the fourteenth century, is associated with the Church of Alexandria and contains charters held under the N. N. that deal mainly with discipline on board ship.[4] Judging from legal and documentary data, we can confidently assert that *dhimmī*s living in the realm of Islam enjoyed autonomy, managed their shipping businesses, and issued their own laws free from any interference from the governing authorities.[5] Nonetheless, this primary conclusion should not

[3] Monks, "Church of Alexandria," 355–362; Bagnall, *Egypt in Late Antiquity*, 289–293; Sherman, "Roman Administrative Marine," 2:65–76; Taubenschlag, *Law of Greco-Roman Egypt*, 2:91–93; Abbadi, "Code of Navigation on the Nile," 157–162.

[4] Letsios, *Das Seegesetz der Rhodier*, 244; *idem*, "Sea Trade," 218–225; Leder, *Die arabische Ecloga*, 114–119, Articles 28:1–7. On p. 19 Leder writes: "mit Ausnahme des letzten des Abschnitts im Unterschied zu allen anderen Teilen des arabischen Textes eine genauere und beinahe fehlerlose Übersetzung der Vorlage bietet." On the basis of his statement, a great deal of the Arabic Ecloga was almost compatible with and faultless translation of Articles III: 1–7 and III:10–15 of the N. N., although its exact date of incorporation into this collection is so far undetermined. However, it could not have taken place prior to the promulgation of the N. N. in Byzantium.

[5] The Christian and Jewish residents and communities maintained autonomous legal systems and institutions in the Muslim world. Disputes between coreligionists would ordinarily be brought before an ecclesiastical court if the disputants were Christians. Similarly, Jews brought such cases before Jewish courts where a Muslim trader or ship owner was not involved. If a Jewish litigant brought the case before a Muslim *qāḍī* against the will of his coreligionist, his community might excommunicate him. Hence it is not surprising that Christian and Jewish legal authorities created commercial laws and issued *responsa* substantially different from those of Muslim jurists. In some cases, the rulings of the legal authorities of *dhimmī*s were comparable to those of their Muslim counterparts. The law in the Islamic Mediterranean was seen as personal and not territorial, *i.e.*, an individual was judged according to the law of his community or even his sect, rather than that of the territory where he happened to be.

be interpreted to mean that the N. N. was concurrently and officially applied to all countries around the Mediterranean.[6]

Although the *Qur'ān* and Prophetic traditions frequently mention the importance of the sea to mankind, neither contains explicit ordinances governing the business of carrying goods and passengers by water. The evolution of the Islamic maritime law in the Mediterranean is, therefore, associated with military conquests, expansion of trade, and the establishment of law schools (*madhāhib*).[7] Since these conquests were not destructive, the existing administrative system and cultural norms in the territories that Muslims took over were sustained. Late seventh and early eighth century Egyptian papyri assert that early governors of Islamic provinces along the Mediterranean maintained former Byzantine naval installations and employed non-Arab craftsmen, seamen, and shipwrights. In addition to their contribution to the development of Islamic naval activity, the *dhimmī*s—mainly native Christians of Syria, Egypt, and North Africa—preserved the maritime laws instituted in the Digest, as well as local customs, for over a century. As the *madhāhib* were established, from the eighth century onwards, many canonical regulations and practices were "Islamicized," as long as they did not contradict the sacred law.

Generally speaking, Byzantine and Muslim lawyers applied mostly the same principles of maritime law, although there were two distinct legal systems. Contracts for hiring seamen from Romano-Byzantine Egypt, compared to Islamic formulae from those of Egypt from the ninth century onwards show that basic legal concepts remained unchanged. The two systems differ, however, as to payment of seamen's salaries and their contribution to losses. Contrary to the Byzantine practice, Prophetic traditions require that seamen's wages be paid in full and in advance. Furthermore, they are exempt from liability for damage or loss of cargo or vessel that they did not purposely cause. The N. N., by contrast, requires seamen to contribute to make up for such loss in proportion to their shares and profit from the voyage. Byzantine seamen were employed to sail in

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[6] Letsios, *Das Seegesetz der Rhodier*, 243–244. He assumes that there were direct and indirect influences of Byzantine maritime customs and laws on their Islamic counterpart. Direct influences are clearly traceable in the Arabic Ecloga, whereas the indirect ones are presumably silent in the A. S.

[7] Ibn Khaldūn, *Al-Muqaddima*, 1:476–483.

anticipation of a profit and therefore shared profits, risks, and losses proportionately to their individual shares in the venture. Under Islamic law in the Muslim world, however, sailing for a wage predominated, so that the law protected mariners' incomes against exploitation by employers or shippers. Thus, differing legal attitudes may have probably resulted from different hiring methods.

Contrary to Islamic law, which distinguishes between the regulations governing river and coastal navigation on one hand, and sailing the high seas on the other, both the Digest and the N. N. seem to have treated all water transport on the same basis. Through its distinctions, Islamic law clearly stipulates when shippers must pay the freight in full or in part, when they are subject to extra charges, or when they are exempt from shipping charges. Most importantly, Muslim law doctors instituted new regulations pertaining to the hire of non-vessel-operating common carrier, or what they called "a guaranteed personal service." This matter, scarcely addressed in the Digest and poorly hinted in the N. N., appears to be a major Islamic contribution to the evolution of admiralty law. This sort of contract could not have developed without the expansion of Islamic maritime trade in the Mediterranean from the eighth century onwards.

Further differences between Islamic and Byzantine maritime laws are discerned in the laws of general average. Byzantine and Muslim legists hold different views on the legal status of jettisoned commercial items and private property, assessment of jetsam and intact cargoes, human jettison, and the freighter. The same applies to regulations pertaining to saving lives and salvaging property. The guidelines governing collisions are identical, though Islamic judicial literature is much more informative. A major Islamic contribution to the history of maritime law and commerce is the introduction of unprecedented rules regarding the financing of trade. From the eighth through the tenth century, Muslim jurists introduced commercial laws pertaining to maritime *qirāḍ* or *muḍāraba* that may have laid the foundation for the earliest form of the Western *commenda* prior to and during the Commercial Revolution.

A careful examination of early jurisprudential inquiries proves that Muslim religious authorities held controversial legal points of view over various maritime issues. Their controversies can be classified as between: (a) opinions that match charters of the N. N.;[8] (b) others

[8] The similarities between the N. N. and A. S. are explained by the geograph-

that correspond with the Justinianic Digest; and (c) opinions and reasoning that correspond with neither. Differences in opinions within the several schools can be attributed to differences in customary local practices around the Middle Sea, as well as the individual legal reasoning of Muslim jurists.[9] In addition, new precedents may have resulted from the migration of scholars from the Mashriq (Islamic East) to the Maghrib (Islamic West), which in turn led to the transformation of legal elements of eastern origins.[10] Finally, when Muslim jurists encountered unprecedented matters, they simply applied land laws to the sea. On many occasions they issued rulings solely on the basis of analogy (*qiyās*); the ship is compared to the camel, and carriage by sea to carriage on land. The existence of these

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ical neighborhood and the continuation of commercial relations between the Byzantium and the Muslim world; despite their political enmities, trade relations between them were never completely interrupted. The role of the sea as a connecting link between people and cultures contributed to the transforming of maritime practices and rules between different regions around the Middle Sea. A great many of Ancient and Medieval maritime regulations were trans-cultural and extended beyond the local or regional habits. Military expansions and transformation of political powers did not, however, create a dramatic change in the material culture and institutions, except if they contradicted the religious and legal principles of the new reign. Put another way, political boundaries never formed an obstacle to the freedom of movement of either persons or goods. This movement was accompanied, as the Arabic Ecloga establishes, by the transformation of certain admiralty and maritime laws from the Christian to the Muslim world, and vice versa. The admission of foreign laws and habits in the Muslim world in particular was made possible due to the fact that the law was seen as personal and not territorial, *i.e.* an individual was judged according to the law of his/her community, or even his sect, rather than that of the territory in which he happened to be. See Letsios, *Das Seegesetz der Rhodier*, 243; Khalilieh, *Islamic Maritime Law*, 134.

[9] A closer scrutiny of the *dicta* established in the Digest discloses many controversies in personal legal opinions and attitudes among Roman legists.

[10] Besides the Prophet's companions, who joined Islamic troops in their expeditions, Muslim army commanders and governors deliberately transferred ethnic groups from the east to settle and fortify the Syrio-Palestinian coastal frontiers against Byzantine naval raids; this was an initiative of Muʿāwiya as governor of Greater Syria (19–41/640–661). In addition, early Muslim chroniclers and papyri evidence from Egypt report that seafarers from Yemen and Omān, though numerically insignificant, were the earliest Arab elements to take part in establishing the first Islamic navy in the Mediterranean. They may have introduced their maritime heritage there as early as the first half of the seventh century. A very early and famous Muslim legist to immigrate from Medīna to North Africa during the eighth century was Mālik Ibn Anas, founder the Mālikī *madhhab*. Another dominant figure was Asad Ibn al-Furāt, conqueror of Sicily and compiler of the first Mālikī digest called *al-Asadiyya* (later known as *al-Mudawwana*), who arrived in Ifrīqiya from Khurasān in the late eighth or early ninth century.

controversies is compatible with Ibn Khaldūn's description of the process of acculturation:

> The condition of the world and of nations, their customs and sects, do not persist in the same form or in a constant manner. There are differences according to days and periods, and changes from one condition to another. Such is the case with individuals, times, and cities, and it likewise happens in connection with regions and districts, periods and dynasties. . . . The new power, in turn, is taken over by another dynasty, and customs are further mixed with those of the new dynasty. More discrepancies come in, so that the contrast between the new dynasty and the first one is much greater than that between the second and the first one. Gradual increase in the degree of discrepancy continues. The eventual result is an altogether distinct (set of customs and institutions). As long as there is this continued succession of different races to royal authority and government, changes in customs and institutions will not cease to occur.[11]

Despite the legal differences between the A. S. and other Islamic jurisprudential sources on the one hand, and the Digest and N. N. on the other, the legal opinions and rulings of Muslim jurists tend, in general, to favor the Digest's *dicta* and *responsa* rather than the charters instituted in the N. N. The most likely explanation, once again, stems from the fact that the Justinianic Digest had come into North Africa by the early sixth century, and remained ubiquitous, by and large, in Byzantine coastal territories along the Mediterranean at least until the early eighth century.[12] The recently discovered legal evidence proves that Justinian's laws were in force in North Africa, not only in the pre-Islamic era, but even after the Islamic expansion and the formation of Mālikī *madhhab*, though they had been given an Islamic appearance. When issuing their own judgments and legal opinions, the Mālikī law school, which spread in the Maghrib, and its fellow *ʿulamā* could not always overlook local customs (*ʿurf*) and practices some of which followed principles dating back to the second century.

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[11] Ibn Khaldūn, *Al-Muqaddima*, 1:29–30.

[12] Sirks, *Food for Rome*, 168, writes: "After the Arab conquest of North Africa the Justinian compilation ceased to be valid in that region, along with the regulations on transportation of *onus fiscale*." This assumption is partially incorrect, especially if we accept the hypothesis that the Islamic expansion was not destructive and did not change the material culture of the occupied regions. One may assume, however, that eighth century C.E. Islamic legists did not sanction Roman laws that contradicted Islamic principles.

The Islamic expansions in the east and west united the former Persian and Byzantine territories; owing to this new political unity, commercial activity between the Far East and the Mediterranean flourished. Muslim polities around the Mediterranean in particular could not address the demand and expansion of overseas trade and arrange commercial transactions without creating proper laws, *dicta*, and *responsa*. At the time when Muslims gained control over the eastern, central, and western Mediterranean, they issued unprecedented *fatāwā* and *aḥkām* (legal consequences of the facts of cases); in essence, the origins of Islamic maritime laws in the Mediterranean coincided roughly with the spread of the N. N. With that, legal solutions offered by Muslim jurists occasionally differ from those of their Byzantine counterparts. The A. S. contains rules and legal opinions of Mālikī scholars traceable neither to the Digest nor to the N. N. However, this should not be understood to mean that the founders of Islamic law schools abruptly changed the systematic construction of maritime laws in the Mediterranean. Rather, Islamic tradition adopted local maritime regulations and practices, provided they did not oppose the sacred law. The cardinal legal discrepancies between the Byzantine and Islamic legal systems can be narrowed down in the main to financial arrangements.

Muslim jurists developed a maritime legal system covering most, if not all, aspects of shipping in a more informative manner than did the N. N. This raises a question: Why is Islamic legal literature more comprehensive than its Romano-Byzantine counterpart? First, it is perhaps due to the establishment and spread of law schools and academies, the profusion of thousands of jurisprudential sources, and Islamic military and commercial expansions east and west. During the eighth century Mālik Ibn Anas (97–179/715–795) laid down the foundations of Islamic maritime laws in the Mediterranean, having also founded his *madhhab*, whose legal opinions and judgments were widely recognized by his followers in all Islamic countries around the Mediterranean. The absence of both a general code and texts dealing exclusively with Islamic maritime law, other than A. S.—should not be surprising, given that analogical rather than analytical reasoning pervades the whole of Islamic law. Except for Islamic Malay,[13] neither the founders of Islamic law schools, nor their fellow

[13] So far, the maritime codes of Maḥmūd Shāh from 1296 C.E. are considered

jurists and other legal authorities set up maritime codes; however, they published jurisprudential works (*fatāwā*/responsa), collections of judgments (*nawāzil*), and formal legal documents (*shurūṭ*), which were used by judges, lawyers, and students in the *madrasa*s (law academies). The second factor can be attributed to the lack of quantitative documentation from the Byzantine world.[14] Although the maritime regulations are well documented in Byzantine legal codices, the amount of documentary evidence seems to be less than that found in the Muslim world, especially Egypt.

Even when Muslims held sway over a vast region between the Indian and the Atlantic oceans, including its huge bodies of water, Islamic judicial authorities, like their Roman predecessors, never maintained maritime courts.[15] Maritime cases were normally adjudicated in ordinary courts or before the port superintendent, who functioned as a judge. Hence, the absence of Islamic maritime courts should not be taken to signify that the Muslim world did not contribute to the internationalizing the law of the sea in the Mediterranean arena. Thus, in the absence of codified admiralty laws Muslim judges and scholars gave judgments according to their own discretion basing them on interpretation of Qur'ānic regulations, prophetic traditions, customary practices that did not contradict the religious principles, and supplementary jurisprudential sources giving them the tools to interpret, modify, expand, or even disregard precedents established by authoritative jurists. In doing so they issued judgments that were a constituent part of the development of the overseas trade and shipping industry.[16] Last, but not least, a more tantalizing issue that deserves special attention is the presence of the *lafīf*[17] witnesses (jurors)

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to be the oldest Islamic maritime codes to be discovered. See Raffles, "The Maritime Code of the Malays," 62–63.

[14] Letsios, *Das Seegesetz der Rhodier*, 78–79.

[15] The most ancient admiralty courts recorded in historical sources were established by the Athenians and dated as far as the fifth and fourth century C.E. Athens created commercial maritime courts with jurisdiction over written contracts involving the sea-trade between Athens and other ports, affording a rapid adjudication of complaints between the parties regardless of their nationality. For further details, refer to Cohen, *Ancient Athenian Maritime Courts*.

[16] By the beginning of the thirteenth century C.E. the *ijtihād* is said, however, to have diminished, and *taqlīd* (legal conformism) is said to have become a more important characteristic of the legal system.

[17] The *lafīf* witnesses appeared in the practice of Mālikī law school in North Africa and its usage was needed particularly in cases where *ahl ʿudūl* (honorable/trust-

in ordinary courts, including admiralty. This final point raises a major question: Can Islamic admiralty and maritime jurisdiction be categorized as a "common law" system?

This study has outlined the similarities and differences between Roman/Byzantine and Islamic admiralty and maritime laws in the interest of increasing the understanding of the relationship between them during a period of three centuries. It would now be pertinent to compare the A. S. and other pre-eleventh century Islamic legal sources with Tabula Amalfitana (1010), the Ordinances of the Consuls of the Sea of Trani (1063), the Constitutum Usus of Pisa (1233), the Consulate of the Sea of Barcelona (1258),[18] as well as with the ordinances of the commercial empires of Venice, Florence, Genoa, which maintained strong commercial ties with Muslim world from the Commercial Revolution onwards.[19] Such an investigation would enable legal historians to understand and appreciate Islamic influence on the development of an international law of the sea, particularly at a time when more than sixty percent [60%] of the Mediterranean maritime territories was under Islamic rule. Under these conditions when Muslims and Christian powers shared the Mediterranean, it is unconvincing to take for granted that medieval maritime laws owed their origins to the Roman law.

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worthy witnesses) were not available. The *laftf* were not qualified as *'udūl*, but they were nevertheless above reproach for such signs of baseness as lying, imbecility, injustice, drunkenness, or gambling. It was also required that they not have any relationship with or enmity towards the parties in the case. See John A. Makdisi, "The Islamic Origins of the Common Law," *North Carolina Law Review* 77/5 (1999), 1687–1696; Khalilieh, *Islamic Maritime Law*, 93, 103–104.

[18] Boisard believes that the development of the *Consulate of the Sea* was not coincidental. He writes: "It was not purely by chance that the *Consulate of the Sea* [*Consulato del Mer*] blossomed in a region of the world that was most sensitive to exterior influence and Muslim domination. . . . It would be unfair to ascribe to pure coincidence that such a convention—corresponding to 'classical' Islamic laws and practices—appeared in this region of Europe, one which was most influenced by Muslim culture." See Marcel A. Boisard, "On the Probable Influence of Islam on Western Public and International Law," *International Journal of Middle East Studies* 11 (1980), 433.

[19] Islamic local customs could have influenced Christian consuls of these and other European cities stationed temporarily in Levantine, North African, and Andalusian Islamic port cities or their cities' other maritime possessions, where they adjudicated cases between European Christian traders. Subsequently, these customs may have transferred them in one way or another to their homelands.

APPENDICES

APPENDIX ONE

Nomos Rhodion Nautikos

The following are the scope and content of the *Lex Rhodia* as translated and edited by Walter Ashburner, *The Rhodian Sea-Law* (Oxford: Clarendon Press, 1909), 57–69 and 77–125.

Part II
The Chapters of the Rhodian Law

(1) A master's pay is two shares; (2) A steersman's one share and a half; (3) a master's mate's one share and a half; (4) a carpenter's one share and a half; (5) a boatswain's one share and a half; (6) a sailor's one share; (7) a cook's (shall be?) half a share.

8. A merchant may have on board two boys; but he must pay their fare.
9. A passenger's allowance of space is three cubits in length and one in breadth.
10. A passenger is not to fry fish on board; the captain must not allow him.
11. A passenger is not to split wood on board; the captain must not allow him.
12. A passenger on board is to take water by measure.
13. Women on board are to have a space allowance of one cubit; and a boy . . . of a half cubit.
14. If a passenger comes on board and has gold, let him deposit it with the captain. If he does not deposit it and says, 'I have lost gold or silver,' no effect is to be given to what he says, since he did not deposit it with the captain. (15) The captain and the passengers and the crew, who are on board together, are to take an oath upon the evangels.
16. A ship with all its tackle is to be valued at fifty pieces of gold for every thousand *modii* of capacity, and so is to come into contribution. Where a ship is old, it is to be valued at thirty

pieces of gold for every thousand *modii*. And in the valuation a deduction is to be made of one third, and the ship is to come into contribution accordingly.

17. The law ordains: let them not write moneys lent at sea to be repaid out of property on land without risk. If they do write them, let them be invalid under the Rhodian law. But where loans are made on fields or on hills to be repaid out of property on land without risk, let them write them down in accordance with the Rhodian law.
18. A man borrows money at interest and for eight years pays the legal interest. After eight years it happens that there is a destruction or fire or inroad of barbarians. Let interest cease to be payable in accordance with the Rhodian law. If the man does not pay legal interest, the written contract prevails in accordance with the former agreement, as the writing bears on its face.
19. Captains in actual command, where they contribute not less than three-fourths in value of the ship, wherever they are dispatched, may enter into agreements how they are to borrow money and send it on board ship either for the season or for a voyage, and what they have agreed upon is to prevail; and he who lent money is to send a man to receive payment.

Part III
The Beginning of the Law

1. A ship is lying in harbour or on a beach and is robbed of its anchors. The thief is caught and confesses. The law lays down that he flogged and that he make good twice over the damage he has done.
2. The sailors of ship *A* by direction of their captain steal the anchors of ship *B*, which is lying in harbour or on the beach. Ship *B* is thereby lost. If this is conclusively proved, let the captain who directed the theft make good all the damage to ship *B* and its contents. If any one steals the tackle of a ship or any article in use on board, *i.e.*, ropes, cables, sails, skins, boats, and the like, let the thief make good twice over.
3. A sailor by the captain's order robs a merchant or passenger.

The sailor is detected and caught. Let the captain make good the damage twofold to those who were robbed, and let the sailor receive a hundred blows. If the sailors commits the theft of his own accord and is caught or convicted by witnesses, let him be well beaten, especially if the thing stolen is money, and let him make good the loss to person robbed.

4. The captain brings the ship into a place, which is infested by thieves or pirates, although the passengers testify to the captain what is at fault with the place. There is a robbery. Let the captain make the loss good to the sufferers. On the other hand, if the passengers bring the ship in spite of the captain's protests and something untoward happens, let the passengers bear the loss.
5. If sailors set to fighting, let them fight with words and let no man strike another. If *A* strikes *B* on the head and opens it or injures him in some other way, let *A* pay *B* his doctor's fees and expenses and his wages for the whole time that he was away from work taking care of himself.
6. Sailors are fighting and *A* strikes *B* with a stone or log; *B* returns the blow; he did it from necessity. Even if *A* dies, if it is proved that he gave the first blow whether with a stone or log or axe, *B*, who struck and killed him, is to go harmless; for *A* suffered what he wished to inflict.
7. One of the captains or merchants or sailors strikes a man with his fist and blinds him, or gives him a kick and happens to cause a hernia. The assailant is to pay the doctor's bill, and for the eye twelve gold pieces, for the hernia ten. If the man who gets kicked dies, his assailant will be liable to trial for murder.
8. The captain to whom the ship is entrusted sets sail and runs away into another country with gold by will of the sailors. All their possessions, movable, immovable, and self-moving, as many as belong to them, are to be seized. Unless the amounts which these fetch in a sale make up the equivalent of the ship and the profits of the time (during which they were absent), let the sailors with the deputy captain be let out and make up the full amount of the loss.
9. If the captain is deliberating about jettison, let him ask the passengers who have goods on board; and let them take a vote what is to be done. Let there be brought into contribution the goods;

the bedclothes and wearing apparel and utensils are all to be valued; and, if jettison take place, with the captain and passengers the valuation is not to exceed a *litra*; with the steersman and mate, it is not to exceed half a *litra*; with a sailor, it is not to exceed three *grammata*. Slaves and any one else on board who is not being carried for sale are to be valued at three *mina*s; if any one is being carried for sale, he is to be valued at two *mina*s. In the same way if goods are carried away from enemies or by robbers or . . . together with the belongings of sailors, these too are to come into the calculation and contribute on the same principle. If there is an agreement for sharing in gain, after everything on board ship and the ship itself have been brought into contribution, let every man be liable for the loss which has occurred in proportion to his share of the gain.

10. If the captain and crew are negligent and there is an injury or wreck, let the captain and crew be responsible to the merchant for making the damage good. If it is through the merchant's negligence that ship and cargo are lost, let the merchant be responsible for the loss caused by the shipwreck. If there is no default either of the captain or crew or merchant, and a loss or shipwreck occurs, what is saved of the ship and cargo is to come into contribution.
11. The merchants and passengers are not to load heavy and valuable cargoes on an old ship. If they load them, if while the ship is on voyage it is damaged or destroyed, he who loaded an old ship has himself to thank for what has happened. When merchants are hiring ships, let them make precise inquiry from the other merchants who sailed before them before putting in their cargoes, if the ship is completely prepared, with a strong sail-yard, sails, skins, anchors, ropes of hemp of the first quality, boats in perfect order, suitable tillers, sailors fit for their work, good seamen, brisk and smart, the ship's sides staunch. In a word let the merchants make inquiry into everything and then proceed to load.
12. If a man makes a deposit in a ship or in a house, let him make it with a man known to him and worthy of confidence before three witnesses. If the amount is large, let him accompany the deposit with a writing. If the man who agreed to take charge of the deposit says that it is lost, he must show where the wall

was broken through and how the theft took place and take an oath that there was no fraud on his part. If he does not show it, let him restore the goods safe as he received them.

13. If a passenger comes on board and has gold or something else, let him deposit it with the captain. If he does not deposit it and says 'I have lost gold or silver', no effect is to be given to what he says. But the captain and the sailors, all those on board together, are to take an oath.
14. A man receives a deposit and then denies it. Evidence is taken in the matter. In due course the deposit is found on him after he had taken an oath or denied his liability in writing. He is to make good the deposit twice over and suffer the penalty of his perjury.
15. A ship carries passengers or merchants or slaves whom the captain had taken in deposit. The captain comes to a city or harbour or shore, and some leave the ship. Robbers give chase or pirates make an attack and the captain gives the signal and gets away. The ship is saved with the property of the passengers and merchants that is on board. Let each receive back his own goods, and let those who went out receive back their respective goods and chattels. If any one is minded to pick a quarrel with the captain for leaving him on shore in a place infested by robbers, no effect is to be given to what he says because it was only when they were pursued that the captain and crew fled. If a merchant or passenger had somebody else's slave in deposit and left him in any place, let him make the loss good to his master.
16. Captains and merchants and whosoever borrow money on the security of ship and freight and cargo are not to borrow it as if it was a land loan . . . if the ship and the money are saved . . . let them pay back the loan from the property on land with maritime interest.
17. *A* gives gold or silver for the (needs) of a partnership. The partnership is for a voyage, and he writes down as it pleases him till when the partnership is to last. *B*, who takes the gold or the silver, does not return it to *A* when the time is fulfilled, and it comes to grief through fire of robbers or shipwreck. *A* is to be kept harmless and receive his own again. But if, before the time fixed by the contract is completed, a loss arises from the dan-

gers of the sea, it seemed good that they should bear the loss according to their shares and to the contract, as they would have shared in the gain.[1]

18. A man borrows money and goes abroad. When the time agreed upon has expired, let them recover from his property on land according to law. If they cannot recover the debt, the capital of their loan shall be unconditionally repayable, but the interest shall be maritime interest for so long as he is abroad.
19. If a man hires a ship and gives earnest-money and afterwards says 'I have no need of it', he loses his earnest-money. But if the captain acts wrongfully, let him give back to the merchant double the earnest-money.
20. Where a man hires a ship, the contract to be binding must be in writing and subscribed by the parties, otherwise it is void.[2] Let them also write penalties if they wish. If they do not write penalties, and there is a breach, either by the captain or by the hirer—if the hirer provides the goods . . . let him give the half of the freight to the captain. If the captain commits a breach, let him give the half-freight to the merchant. If the merchant wishes to take out the cargo, he will give the whole freight to the captain. These penalties shall be exacted as in cases where *A* brings a suit against *B*.
21. Two persons make a partnership without writing. Both the parties confess 'we made a partnership on another occasion without writing and kept faith one to the other and paid the tax on all occasions as if for a single capital'. Something happens to one of the ships, either while it is in ballast or when it is loaded. What is saved is to contribute one-fourth part to the sufferer, since they do not bring forward a contract in writing but formed a partnership by word of mouth only. But let contracts in writing subscribed by the parties be firm and valid, and let the part saved contribute to the part lost.

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[1] Pryor's translation of the final clause reads: ". . ., just as it seems right [to receive shares] of the gain, [so] it seems right to assume the losses in proportion to the shares according to the agreements." See Pryor, "The Origins of the *Commenda* Contract," 24.

[2] Justice's translation of the first paragraph reads: "In hiring of ships, the charter-parties shall not be valid, except they be sealed" (Justice, *General Treatise*, 99). Letsios translates it as follows: "If someone leases a ship and the agreement is sealed by both parties, then the contract is valid, otherwise it is invalid" (Letsios, *Das Seegesetz der Rhodier*, 261).

22. Let the captain take nothing but water and provisions and the ropes which ships have need of, where the merchant loads the whole ship according to their written contract. If the captain is minded to put in other cargo after this, if the ship has room, let him put it in; if the ship has no room, let the merchant before three witnesses resist the captain and sailors; and, if there is jettison, it will rest with the captain, but if the merchant does not prevent it, let him come to contribution.
23. If there is a contract in writing between captain and merchant, let it be binding; but if the merchant does not provide the cargo in full, let him provide freight for what is deficient, as they agreed in writing.
24. The captain takes the half-freight and sails and the merchant wishes to return. They made and subscribed a contract in writing. The merchant loses his half-freight by reason of his hindrance. Where there is a contract in writing and the captain commits a breach, let him return the half-freight and as much again.
25. If the limit of time fixed by the contract passes, let the merchant provide the sailors' rations for ten days. If the second limit also passes, above all things let the merchant make up the full freight and go away. But if the merchant is willing to add so much to the freight, let him give it and sail as he pleases.
26. If one of the crew or captains sleeps off the ship and the ship is lost whether by day or night, all the damage regards the members of the crew or captains who slept off the ship, while those who remained on board go harmless. Those who were negligent must make good to the owner of the ship the damage, which was done by reason of their negligence.
27. A ship is on its way to be freighted by a merchant or a partnership. The ship is damaged or lost by the negligence of sailors or of the captain. The cargo, which lies in the warehouse, is free from claims. If evidence is given that the ship was lost in a storm, what is saved of the ship is come into contribution together with cargo and the captain is to retain the half-freight. If one of the partners denies the partnership and is convicted by three witnesses, let him pay his share of the contribution and suffer the penalty of his denial.
28. If a ship is hindered in the loading by a merchant or partner, and the time fixed for loading passes, and it happens that the

ship is lost by reason of piracy or fire or wreck, let him who caused the hindrance make good the damage.

29. If the merchant does not provide the cargo at the place fixed by the contract, and the time fixed for loading passes, and a loss happens by reason of piracy or fire or wreck, all the injury to the ship regards the merchant. But if the days of the allowed time have not passed when something of this sort happens, let them come to contribution.
30. If the merchant loads the ship and there is gold with him and the ship happens to suffer one of the maritime risks and the cargo is lost and the ship goes to pieces, let what is saved from the ship and the cargo come to contribution, but let the merchant take his gold with him on paying a tenth. If he was saved without clinging to any of the ship's spars, let him pay the half-fare in accordance with the contract; if he had to cling for safety to one of the spars, let him pay one-fifth.[3]
31. If the merchant loads the ship and something happens to the ship, all that is saved is to come into contribution on either side; but the silver, if it is saved, is to pay a fifth; and the captain and the sailors are to give help in salving.
32. If a ship is on its way to be loaded, whether it is hired by a merchant or goes in partnership, and a sea disaster takes place, the merchant is not to ask back the half-freight, but let what remains of the ship and the cargo come to contribution. If the merchant or the partner has also given an advance, let their agreement made in writing prevail.
33. If the captain puts the cargo in the place fixed by the contract and the ship comes to grief, let the captain recover the freight in full from the merchant, but the goods which have been unloaded into warehouses are safe from those which are on board the ship together with the ship come into contribution.

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[3] Spatharakis, "The Text of Chapter 30 of the Lex Rhodia Nautica," 215. His translation reads: "If the merchant who loads the ship has gold with him and the ship happens to suffer one of the maritime risks and the cargo is lost and the ship is broken into pieces, let what is saved from the ship and the cargo come to contribution, but let the merchant take his gold with him. Let him pay a tenth if he was saved without clinging to any of the ship's equipment;—let him pay the half-freight according to the contract—but if he was saved by clinging to any of the ship's equipment, let him pay a fifth."

34. If a ship is carrying linen or silk, let the captain supply good skins, in order that in a storm no harm may be done to the freight by the dashing of the waves. If the water rises in the hold, let the captain say so at once to those who have the cargo on board, in order that it may be brought up. If the passengers make it manifest to the captain and for all that the cargo is injured, the captain is responsible together with the sailors. If the captain declares beforehand together with the sailors that the water is rising in the ship and the goods must come up, but those who loaded the goods neglect to bring them up, let the captain and sailors go harmless.
35. If a ship makes jettison of its mast, whether it breaks of its own accord or is cut, let all the sailors and the merchants and the goods and the ship so far as saved come into contribution.
36. If a ship in sail runs against another ship which is lying at anchor or has slackened sail, and its is day, all the collision and the damage regards the captain and those who are on board. Moreover let the cargo too come into contribution. If this happens at night, let the man who slackened sail light a fire. If he has no fire, let him shout. If he neglects to do this and a disaster takes place, he has himself to thank for it, if the evidence goes to this. If the sailsman was negligent and the watchman dozed off, the man who was sailing perished as if he ran on shallows and let him keep harmless him whom he strikes.
37. If the ship comes to grief and the property of the merchants or passengers is saved while the ship is lost, let the debentures, which are saved provide one-fifteenth, but let not the merchant and the passengers give the ship to the captain.
38. If a ship loaded with corn is caught in a gale, let the captain provide skins and the sailors work the pumps. If they are negligent and the cargo is wetted by the bilge, let the sailors pay the penalty. But if it is from the gale that the cargo is injured, let the captain and the sailors together with the merchant bear the loss; and let the captain together with the ship and the sailors receive the six-hundredths of each thing saved.[4] If goods

[4] Based on the translation of Justice, Dareste, and Freshfield the remuneration fee for salvaging the jettisoned cargo is fixed at 1% rather than 6% of the jetsam's value as Ashburner has translated. See Justice, *General Treatise*, 109; Dareste, "*Lex Rhodia*," 23; Freshfield, *A Manual of Later Roman Law*, 203.

are to be thrown into the sea, let the merchant be the first to throw and then let the sailors take a hand. Moreover none of the sailors is to steal. If any one steals, let the robber make it good twofold and lose his whole gain.

39. A ship with a cargo of corn or wine or oil is in full sail. By wish of the captain and crew who slacken sail, the ship goes into a place or on a beach against the wish of the merchant. It happens that the ship is lost, but the cargo or goods are saved. The merchant is to suffer no harm from the loss of the ship, since he did not wish to go into that place. If while the ship is in full sail, the merchant says to the captain 'I want to go into this place', and the place is not comprised in the charter-party, and it happens that the ship is lost while the goods are saved, let the captain have his ship made good by the merchant. If it is by wish of both parties that the ship is cast away, let everything come to contribution.
40. A ship is wrecked, and part of the cargo and the ship is saved. The passengers have on them gold or silver or whole silks or pearls. Let the gold that is saved provide a tenth, and the silver contribute a fifth. Let the whole silks, if they are saved dry, contribute a tenth, as being equal to gold. If they are wetted, let an allowance be made for the abrasion and the wetting, and let them come into contribution on that footing. Let the pearls according to their valuation contribute to the loss like a cargo of gold.
41. If there are passengers on board and the ship is injured or destroyed, but the goods of the passengers are saved, let the passengers make a payment towards the loss of the ship. If passengers two or three lose their gold or their goods, let them receive from all according to their capacity towards the loss together with the contribution of the ship.
42. If a ship springs a leak while it is carrying goods and the goods are taken out, let it lie with the captain, whether he wishes to carry the goods in the ship to the trading-place agreed upon, if the ship is repaired. If the ship is not repaired but the captain takes another ship to the trading-place agreed upon, let him give the whole freight.
43. If a ship is caught in a storm and makes jettison of its cargo, and breaks its sailyards and mast and tillers and anchors and

rudders, let all these come into contribution together with the value of the ship and of the goods which are saved.

44. A ship has a cargo, and in a gale the mast is jettisoned or the tillers broken or one of the rudders lost. If it happens that the cargo gets wet from the gale, there is every necessity that these should come to contribution. But if the cargo is hurt more from the bilge and not from the gale, let the captain take the freight and hand the goods over dry and in quantity as he took them.
45. If in the open sea a ship is overset or destroyed, let him who brings anything from it safe on to land receive instead of reward the fifth part that which he saves.
46. A boat breaks the ropes and gets off from its ship and is lost with all hands. If those on board are lost or die, let the captain pay their annual wages for the full year to their heirs. He who saves the boat with its rudders will give them all back as he in truth finds them and receive the fifth part of what he saves.
47. If gold or silver or anything else is raised from the sea from a depth of eight fathoms, let the salvor receive one-third. If it is raised from a depth of fifteen fathoms, let the salvor receive one-half by reason of the danger of the sea. Where things are cast from the sea to land and found there or carried to within one cubit of the land, let the salvor receive one-tenth part of what is salved.

Appendix A

Prologue

First Form

Sea-law of the Rhodians, which was promulgated by the divine emperors, Adrianus Tiberius Lucius Septimius Severus Pertinax semper augusti.

Tiberius Caesar Augustus pontifex maximus, in the thirty-second [year] of his tribunician power, says as follows: The sailors, captains,

and the merchants having approached me in order that events at sea in a storm may come to contribution, Nero answered and said: 'Greatest, wisest, and most steadfast Caesar, what is established by your greatness I think is necessary to display, without passing over a single statement, having carefully sought out in Rhodes and imparted all matters relating to those who sail on ships, captains and merchants and passengers, and to deposits of capital and partnerships, and to purchases and sales of ships, and works of shipbuilding, and to deposits of gold and silver and of various goods'. All these things Tiberius Caesar determined by his vote, and sealed and handed over to Antoninus the illustrious consul. They bring it before consuls in the most fortunate city, head of all others, Rome, in the consulship of the illustrious Laurus and Agrippina. These brought it before the emperor Vespasian, and having sealed it in the presence of the senate Ulpius Trajanus determined that it was the Rhodian law together with the illustrious senate. But let the law of the sea be determined by the nautical law. The same was determined by the divine Augustus.

Second Form [The second form, after going on much as above, has this addition]

The emperor Adrian in the consulship of Clarus and Alexander having sealed it laid down that the Rhodian law was just and had authority. Tiberius Caesar said: I say there is no greater danger than to come into contribution when the mast breaks off of its own accord. If it is necessary, let the mate and the ship's carpenter bring their axes and cut the mast in order that the ship may not sink, and let this come to contribution.

Appendix D

I. If a sailor sent on business be a shareholder, one who receives a share under contract, he must execute every commission of the ship and may go away when his time is expired. If he wishes to go away before the time is expired, let him receive seventy blows and so he is to sail. If he is found stealing, he is to receive one hundred blows and let him lose his share.
II. If a sailor who is sent by the captain for wood or elsewhere goes with comrades and is left behind, let the captain pay him. If he

does not go with comrades, if any accident happens to him who is sent, let the captain pay him.

III. If a sailor hires himself out, let him know that he is a slave and has sold himself, and that he is to execute every commission. And if he is sent out let him perform his duty faithfully, committing no theft or wrongdoing, but acting with zeal and goodwill worthily, receiving in full his additional salary. If he steals gold or silver, let him lose his freedom and salary and become a slave, having handed himself over to punishment.

IV. If a slave is let out by his master to a workshop or a business, let his master tell the truth about his trustworthiness. If the master does not tell and the slave commits a theft and runs away, the theft and the flight and the death are to be made up by the master out of his wages.

Appendix E

48. Let him who robs from captains make it good fourfolds.
49. Let him who puts his private load on the public load and compels the captain to this course not only be fined and have no remedy in case of shipwreck but also be severely punished.
50. Let those who seize anything from the pitiable condition of the shipwrecked or who gain anything from them by fraud make it good fourfold to those whom they have wronged. He who with force and violence carries things off from a shipwreck is to make them good, and, in addition, if he is free, he is relegated for three years; if they are persons of low rank, they are put into a public work for the same period; if they are slaves, they are sent off to harder labour under the fisc.

APPENDIX TWO

Manuscript nº 1.155 (2) of la Biblioteca del Real Monasterio de San Lorenzo de El Escorial, folios 41*v.* to 55*r.*, based on the transcription and publication of Muṣṭafā A. Ṭāher, "*Kitāb Akriyat al-Sufun wal-Nizāʿ bayna Ahlihā—Treatise concerning the Leasing of Ships and the Claims between (Contracting) Parties*," *Cahiers de Tunisie* 31 (1983), 13–53. Note: numbers in square brackets refer to the folios of the El Escorial manuscript, those in parentheses to Ṭāher's edition as published in *Cahiers de Tunisie*. Although I have relied heavily on Ṭāher's edition, I have come across a few errors, such as missing words and mistakes in the transcription, when comparing it with the original manuscript.

[41v.] Treatise Concerning the Leasing of Ships
In the Name of God, the Compassionate the Merciful

May peace be upon our master Muḥammad and upon his next of kin and household

(13) The jurist Abū al-Qāsim Khalaf Ibn Abī Firās, may God have mercy upon him, has said: Praise be to God who has created the creation with His prowess, vanquished the giants with His might, allocated resources and means by His wisdom, and ordained matters in accordance with His wishes, without the benefit of a past example or a plan to serve as a beacon, or assistance sought or obtained. Praise be to God so profound as to elicit His acceptance and His all-encompassing knowledge; and may God's peace be upon His chosen servant and His elected messenger, lord of all Arabs and non-Arabs and all of his next of kin, his household and his followers.

Now then—may God safeguard us from everything that causes His displeasure—you have said that when you saw the saying of the Prophet, may God's blessing and peace be upon him: "Whoever hires an employee, let him do the hire at a fixed wage and for a

defined duration,"[1] you surmised and envisioned how is it possible, then, to allow seamen to be hired on ships without explicitly mentioning this element [the duration]? You have asked me to clarify this and explain it with reference to the possible existence of further inquiries and judgments mentioned in various *nawāzil*[2] concerning the leasing of ships and the claims between (contracting) parties. So I did so by supplementing legal inquiries and decrees that you do not find in the version of this treatise I previously sent to you.[3] You have asked me to elucidate this topic and hence I have written to you this [fuller] version, which encompasses all matters that may occur to you and about which you might be asked at your place, God willing. [I have written this treatise] after exhausting the limits of my capability, and having devoted all my energies to the pursuit of answers to these issues. I have drawn upon the statements and interpretations of learned jurists on this subject and enclosed illustrations to facilitate your understanding of these problems. I implore God Almighty to guard me against the evils of erroneous and misguided utterances. He, in His Benevolence and Condescension, is the Redeemer and Guide to success.

I. *Hiring Seamen for Ships*

Since learned scholars have approved of paying the freight[4] for leasing ships [to travel] from one country to another without fixing all the specifics of this arrangement, it is, [by the same token] permissible to hire seamen and to pay them on the ships. [This is so]

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[1] Saḥnūn, *Al-Mudawwana*, 4:409; Shammākhī, *Īḍāḥ*, 3:531, 550; Khushanī, *Uṣūl al-Futyā*, 145–146; Ibn ʿĀṣim, *Iḥkām al-Aḥkām*, 198–199.

[2] *Nawāzil* (sing. *nāzila*): collections of queries, judgments, and legal responses relating to actual incidents presented to a judge or jurisconsult for final settlement. With reference to our text, the term *nawāzil* probably signifies legal precedents.

[3] Evidently the author sent an earlier version that omitted some legal issues. The current treatise consists of a wider range of maritime issues and covers the topic from different perspectives, including the opinions of Mālikī legal authorities. The far-flung correspondence among Muslim jurists of Crete, Egypt, North Africa and Andalusia may indicate an attempt to unify maritime customs and laws by applying legal opinions of Muslim jurists from one Islamic Mediterranean territory to other ones.

[4] In shipping law, this term is limited to mean the price paid for the transportation of goods.

because leasing the ships is an original element in the contract [*aṣl*], whereas hiring the seamen is the derived element [*farʿ*], for no ship can sail without them; thus, whatever impediments may confront seamen will also befall the ship.

(14) The validity of the contract for leasing ships and hiring seamen, and such, depends on the safe delivery [of the cargo],[5] on the professional behavior [of the crew],[6] and on clearly designating a destination; [these principles] stand in the place of an explicit stipulation.[7] Leasing pack camels to transport [goods from] one country to another is similar. Once the distance is known, one does not stipulate the number of days involved.

Were we not allowed to hire seamen unless all relevant stipulations of the contract were known, it would necessarily follow that leasing a ship to sail from one country to another would not be allowed unless these stipulations were precisely defined.[8] No learned scholar, however, has ever embraced such an interpretation. Indeed most jurists have disapproved of it and claimed that such conditions were not to be attached to the leasing of ships since they are beyond human control and God, the Great and Almighty, "hath made them subject,"[9] the same as He subjugated the winds[10] and the sea.[11] Dealing with the leasing of ships, there is a statement attributed to Mālik[12] that I shall quote in due course, God willing.

Someone may argue that perhaps seamen and ship owners will assume that their sojourn [at sea] is to be short, but it turns out that it is prolonged; therefore, their hire is not permissible without specifying the duration of it. But the issue is similar to the use of pack camels that also could possibly speed up and traverse a dis-

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[5] *Salāma*: Safety and well being of the cargo, *i.e.*, the goods are safely delivered to their destination.

[6] *Istiqāma*: Responsible professional behavior of seamen, *i.e.*, the seamen should not deliberately spoil the cargo and the contents of the vessel.

[7] Wansharīsī, *Al-Miʿyār*, 8:297–298.

[8] Ibn Ḥazm, *Al-Muḥallā*, 7:26; Shammākhī, *Īḍāḥ*, 3:531; Shiqṣī, *Manhaj al-Ṭālibīn*, 12:295.

[9] *Qurʾān* 14:32.

[10] *Qurʾān* 38:36.

[11] *Qurʾān* 45:12.

[12] Mālik Ibn Anas (97–179/715–795) was the founder of the Mālikī *madhhab*, a Sunnī legal school, which spread westwards from its first centers, Medīna and Egypt, over almost all of Muslim North, Central and West Africa, and the Mediterranean Islands. It was also predominant in Muslim Spain.

tance in a short time or could conceivably slow down and traverse a distance over a long time. But the validity of the contract for leasing pack camels, ships, and other conveyances, as we have stated, depends on safe delivery [of cargo] and on the professional conduct [of the employees]. Should a hindrance impede them or an accident befall [the ship], judgment would then be considered forthwith. If such an accident does not inflict serious damage on either party to the contract, they should be patient and wait until the disappearance of the contingency. However, if it should inflict harm on them, such as delaying the passengers' departure to a time when travel is hazardous due to rough seas, the onset of winter, or for fear of an enemy, then the contract between them shall be null and void.[13] On the annulment of the contract, jurists hold controversial opinions that I will present at the proper place, God willing.

The annulment [of the contract] corresponds with the [Prophetic] tradition: "There shall be no harming of one man by another."[14] Also, it is just like the *aḥwal* (squint-eyed) and the *ru'yān* (full vision)[15] or the *arḥā*,[16] (15) which, when water dries up in their encampment, or its indigenous dwellers (landlords) repossess the area around it, causes the agreement between them to lapse. Equally, when a hired slave falls sick or escapes slavery before the termination of his servitude, the case is brought before a judicial authority to invalidate the contract between the slave's owner and the man he was hired to. [In all cases], since the contract is conditioned on security and uprightness, then the turn of events makes invalidation of the contract imperative. However, it has been already held that if what transpired did not cause tremendous harm to either party, he should be patient until the contingency passes. Mālik is reported in Ibn al-Mawwāz's[17] book as saying: If the crewmen are hired on a ship for

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[13] Qarāfī, *Al-Dhakhīra*, 10:378; Kindī, *Al-Muṣannaf*, 21:153–154; Shiqṣī, *Manhaj al-Ṭālibīn*, 12:295–296, remarks that a seaman may abrogate the contract if sailing aboard the ship is risky owing to inadequate caulking and equipment; the contract is nullified after the ship has been examined by experts in maritime industry.

[14] *Lā ḍarar wa-lā ḍirār*—no licit good faith contract should lead to harm either to oneself or damage to others. See Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:136.

[15] *Qur'ān* 6:50: "can the squint-eyed be held equal to the seeing?" See also *Qur'ān* 11:24; 13:16; 35:19; 40:58) often compares the blind with those who see clearly.

[16] The *arḥā* means independent-minded tribes relying on self-sufficiency and discarding interdependence.

[17] Abū ʿAbd Allāh Muḥammad Ibn Ibrāhīm Ibn Ziyād al-Mawwāz (180–269/796–882) is a Mālikī jurist from Alexandria of the third generation Mālikī jurists

a three-day journey, but the wind entraps them for twenty days, whereupon they request termination of the contract and settlement of the bill, they will not be entitled to do so, nor will the ship owner if he asks for [termination and annulment]. Mālik approved, according to this ruling, fixing a timetable on the lease of a ship and counseled patience should delay cause no serious harm to any of the contracting parties. Hiring a ship and her crew [for voyages] from one town to another is permissible, in our view, because custom (*ʿurf*) in this case replaces and even supersedes an explicit stipulation. Do not you see how Ibn al-Qāsim[18] endorses the hiring of an artisan to construct a house and allows him to supply the gypsum and clay without specifying the exact quantities to be used in the building, nor the time necessary for its completion? Now, since the quantity of materials to be used in the construction of a building is standard and the period of time for completion of the job is known by custom, these would stand in the place of an explicit contractual stipulation. If it should be concluded that that agreement had been made to award a contract for construction, but did not stipulate that the artisan had to do it by his own hand, and he was paid for it, then a subcontract is permissible. It is also inappropriate to fix a time for completion of the construction, or [42*v*.] the quantity and

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(*ṭabaqa al-thālitha*). He is the author of various books of which the most important is *Kītāb al-Mawwāziyya*, considered as important as Saḥnūn's *Mudawwana*. It is one of the most comprehensive, and reliable jurisprudential works of the Mālikīs. Qāḍī ʿIyāḍ, *Tartīb al-Madārik wa-Taqrīb al-Masālik li-Maʿrifat Aʿlām Madhhab Mālik* (Ribāṭ: Wizārat al-Awqāf wal-Shuʾūn al-Maghribiyya, 1965), 4:167–169; Ibn Farḥūn, *al-Dībāj al-Mudhahhab fī Maʿrifat Aʿyān ʿUlamāʾ al-Madhhab* (Cairo: Dār al-Turāth lil-Ṭabʿ wal-Nashr, 1972), 2:166–167; Jalāl al-Dīn al-Suyūṭī, *Ḥusn al-Muḥāḍara fī Akhbār Miṣr wal-Qāhira* (Cairo: al-Maṭbaʿa al-Sharqiyya, ?), 1:199; Muḥammad Ibn Muḥammad Makhlūf, *Shajarat al-Nūr al-Zakiyya fī Ṭabaqāt al-Mālikiyya* (Beirut: Dār al-Kitāb al-ʿArabī, 1930), 68; Khayr al-Dīn al-Zirkilī, *Al-Aʿlām* (Beirut, 1979), 6:183.

[18] Abū ʿAbd Allāh ʿAbd al-Raḥmān Ibn al-Qāsim Ibn Khālid Ibn Junāda al-ʿUtqī al-Miṣrī, known as Ibn al-Qāsim (133–191/751–806) is an Egyptian born jurist and one of Mālik's disciples, who was well versed in sufism and the sciences. His famous judicial compilation, *Kītāb al-Mudawwana*, consists of large number of legal *responsa* narrated by the *Imām* Mālik. Abū Isḥāq al-Shīrāzī, *Ṭabaqāt al-Fuqahāʾ* (Beirut: Dār al-Rāʾid al-ʿArabī, 1970), 150; Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 3:244–261; Shihāb al-Dīn Abī al-Faḍl Aḥmad Ibn ʿAlī Ibn Ḥajr al-ʿAsqalānī, *Tahdhīb al-Tahdhīb* (Hayderabad: Dāʾirat al-Maʿārif al-Nizāmiyya, 1907), 6:252–254; Abū al-ʿAbbās Shams al-Dīn Aḥmad Ibn Muḥammad Ibn Khallikān, *Wafayyāt al-Aʿyān wa-Anbāʾ Abnāʾ al-Zamān* (Cairo: Maktabat al-Nahḍa, 1948), 2:311–313; Ibn Farḥūn, *Al-Dībāj*, 1:465–468; Michele Amari, *Al-Maktaba al-Ṣiqilliya* (Baghdād: Maktabat al-Muthanā, 1969), 185–186; Makhlūf, *Shajarat al-Nūr*, 58; Zirkilī, *Al-Aʿlām*, 4:97.

quality of gypsum and clay to be used in it since custom in such cases replaces an explicit contractual stipulation. Such examples are found in tailoring, weaving and elsewhere, where [the completion time] is not specified in the hiring contract. Since the time element for completion of work is known among people, this takes the place of a condition specifying a time of completion. As Saḥnūn[19] reportedly said: "If hiring arrangements are to be admitted solely on the basis of analogy (*qiyās*),[20] most will be invalidated; [only recourse to custom makes them licit]."[21] Success granted by God.

II. *Chapter on the Hire of Ships: Forms of Hire, Guaranteed Service or a Particular Means of Transport; Rent on a Specific or General Facility; Collecting Part of the Cargo in Lieu of Transport—What Is Licit and Illicit; the Profit Involved*

(16) Leasing ships is like hiring pack or riding animals. It takes one of two forms: a guaranteed personal service, or hiring a specific ship,

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[19] Abū Saʿīd ʿAbd al-Salām Ibn Saʿīd Ibn Ḥabīb al-Tanūkhī, known as Saḥnūn (160–240/777–854), was a judge and a Mālikī jurist of the first generation (*ṭabaqa al-ūlā*), but did not see or meet *Imām* Mālik. He studied with Ibn al-Qāsim, Ibn Wahb and Ashhab and became the outstanding scholar of the Maghrib. His family immigrated from Ḥomṣ, Syria, to Qayrawān, Tunisia, where he was a *qāḍī* from 234/848 until his death in 240/854. *Kitāb al-Mudawwana*, attributed to Ibn al-Qāsim, is regarded as one of the outstanding jurisprudential sources used by the people of Qayrawān. Shīrāzī, *Ṭabaqāt al-Fuqahāʾ*, 156–157; Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 4:45–88; ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 6:252–254; Ibn Khallikān, *Wafiyyāt al-Aʿyān*, 2:352–354; Abū Bakr ʿAbd Allāh Ibn Abī ʿAbd Allāh al-Mālikī, *Riyāḍ al-Nufūs fī ʿUlamāʾ al-Qayrawān wa-Ifrīqiya* (Cairo: Maktabat al-Nahḍa al-Miṣriyya, 1951), 1:249–290; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 2:30–37; Amari, *Al-Maktaba al-Ṣiqilliya*, 186–187; Makhlūf, *Shajarat al-Nūr*, 69; Zirkilī, *Al-Aʿlām*, 4:129.

[20] *Qiyās*: Analogy, syllogism—the extension of the *ḥukm* of a specific case established by the texts to a case under deliberation on the basis of a common underlying cause. The equivalent term of the Ḥanafites is *istiḥsān*. This principle was used by the Ḥanafī and Mālikī law schools where the rule indicated by strict analogy or syllogism is ignored and a rule based on other factors like a general principle of necessity, is preferred. The contract for hiring is an example. Strict syllogism (*qiyās*) maintains that a contract cannot be concluded for benefits that are not in actual existence. In the hiring contract for wages, for example, the services of the worker will emerge only when he begins work, but do not exist at the time of the contract. The Ḥanafites would say that the contract is permissible on the basis of necessity, because the benefits to be derived from the worker cannot possibly be brought into existence before the contract. The same situation prevails in renting property and in many other cases. This juristic preference is called *istiḥsān*.

[21] Wansharīsī, *Al-Miʿyār*, 8:225; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:495, 502.

pack camel, or riding animal.[22] ʿUmar Ibn al-Khaṭṭāb and ʿAlī Ibn Abī Ṭālib, may God be pleased with them, stated with reference to [the rental] of a specific beast of burden that if it were to perish, the contract is null and void. The lessor does not have to bring a substitute, except if reaching the destination is stipulated; in such a case, the service is guaranteed. The same principle applies to leasing a ship. It is unlawful to stipulate that a ship must bring with it a substitute in case she is wrecked, just as it is unlawful to require that a pack animal must have with it a substitute in case the first perishes. However, in the absence of such a condition, the contract is permissible and will be terminated with the death of the beast of burden or the wreck of the ship. The ship and the beast of burden are in the same category as the employee and the shepherd. Just as it is forbidden to hire an employee or a shepherd with the guarantee that he must provide for a substitute for himself at the same amount he is paid in the event he dies, so it is with hiring a specific pack animal or a particular ship. It is unlawful to lease a particular beast of burden or ship on the condition that if the beast were to perish or the ship be wrecked, her owner is required to procure a substitute.[23]

Muḥammad Ibn al-Mawwāz holds: It is not permissible for a specific individual to make a condition guaranteeing his soundness of mind or usefulness, nor that of a specific shepherd, pack camel, slave, employee, ship, or house to guarantee that if he/it perishes, a replacement would be called for. But it is permissible to agree on the specific object itself, so that if it were to perish, an obligation would arise.[24] Hiring an employee should only be to perform a particular task; the lessor or employee is commissioned to complete it because completion is the subject matter of the contract.[25] [A lessee

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[22] Saḥnūn, *Al-Mudawwana*, 4:409. On composing a contract of carriage in a specific ship, consult al-Ṭaḥāwī, *Al-Shurūṭ al-Ṣaghīr*, 1:447; Ibn al-Mughīth, *Al-Muqniʿ fī ʿIlm al-Shurūṭ*, 442–444; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 224–225; Marrākishī, *Wathāʾiq al-Murābiṭīn wal-Muwaḥḥidīn*, 470–472; Ibn ʿĀṣim, *Iḥkām al-Aḥkām*, 197; Ibn Salmūn, *Al-ʿIqd al-Munzzam*, 2:4–5; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:659.

[23] Saḥnūn, *Al-Mudawwana*, 4:440; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:38; Ibn al-Barrāj, *Al-Muhadhdhab*, 1:483; Ibn Juzayy, *Al-Qawānīn al-Fiqhiyya*, 281; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 225; Qarāfī, *Al-Dhakhīra*, 5:474–475; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:550–551; Kindī, *Al-Muṣannaf*, 21:155.

[24] Qarāfī, *Al-Dhakhīra*, 5:475.

[25] Qudūrī, *Mukhtaṣar al-Qudūrī*, 118.

cannot stipulate on a lessor to] replace damaged goods [by sound ones], even if the former shows to the latter upon signing the contract, what he does or has done; it is like a condition (*ṣifa*) on what he does or what should be done. If (an exceptional) stipulation were made governing only the lessee, it would be unlawful. If the ship lessee upon signing the contract brings commodities and stipulates that the ship owner not carry other cargo, nor replace it with other [cargo], then such a contract is vitiated. If he agrees to do so and carries that cargo, the ship owner is entitled to collect a comparable freight.[26]

(17) An account is cited in Muḥammad Ibn al-Mawwāz's book and [43*r*.] in the *ʿUtbiyya*, narrated by Abī Zayd,[27] but attributed to Ibn al-Qāsim, where Ibn al-Mawwāz transmits an oral holding from Ibn al-Qāsim that states: If you hire a ship owner to convey you to such-and-such town, but he fails to do so; or, [if] a man brings a ship for lease, but the lessee does not know of any other available vessel, and he (lessee) does not tell him (lessor) "you transport me in this particular ship," [if either of these conditions exists and] if she wrecks after he boards her, then the lessor would have to procure a substitute to transport the lessee. This is a guaranteed service as long as the lessee does not stipulate: "I am leasing from you this particular ship herself," in which case the leasing contract is nullified due to the wreck.[28] Ibn al-Mawwāz adds to Abū Zayd's holding: If a man hired half the ship or a quarter of her space, this would be tantamount to specificity.[29]

Ibn al-Mawwāz says: Mālik holds that there is no harm in chartering a ship for a month. He was further asked: [What if] the wind varies, blows harder or slackens? Response: There is no harm in

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[26] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:120; Kindī, *Al-Muṣannaf*, 21:155–156. The subject is ably addressed by Noble, *Principles of Islamic Maritime Law*, 149–160.

[27] Abū Zaydʿ Abd al-Raḥmān Ibn ʿUmar Ibn Abī al-Ghamr (d. 234/848). Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 2:565; Abū ʿUmar Muḥammad Ibn Yūsuf al-Kindī, *Kitāb al-Wulā wal-Quḍā* (Beirut: Maṭbaʿat al-Ābāʾ al-Yasūʿiyīn, 1908), 503.

[28] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 225; Ibn al-Barrāj, *Al-Muhadhdhab*, 1:483; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:81–82. The lease, according to the Mālikī law school, is a guaranteed service, so long as the lessee has not specified the beast of burden's or the ship's name, or points it out by stating: "this beast of burden or ship of yours."

[29] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:91.

such a thing. The same principle applies to a beast of burden, which might speed up or slow down. For this reason, Muḥammad (Ibn al-Mawwāz) adds that the ports at which the vessel will call and the berths where she will lie must be specified. Although Mālik holds a different opinion, this (view) is nearer to my thinking.[30] Muḥammad holds: If he were asked to convey them to a destination, which he describes as one month's journey or some other time designation, it would be devoid of validity. Mālik was asked: What should happen if a lessee chartered a ship to undertake two consecutive journeys, one in winter and one in summer? Response: There is no harm in such a thing.[31] He was then asked about the ship sailing at the mercy of winds, which may speed up or slow down during the ten days of launching and commissioning her for sailing? Response: The contract is devoid of validity if the departure is delayed, otherwise it is unaffected.

Likewise, if a lessee were to hire a ship, or an employee, or a pack animal to transport goods for a fixed freight—be it a commodity, an animal, or foodstuff (*ṭaʿām*)—to be delivered instantly to the hireling, then such hire is valid. However, if he were to stipulate on the lessor to delay the delivery (payment), (18) then it would be disapproved.[32] It is like purchasing a specific commodity for a long-delayed payment, where mishaps could occur while payment is pending. The purchaser cannot anticipate how that commodity will fare, or whether it will remain intact over the designated long term.[33] What happens, then, if a dispute arises concerning the method of payment where the contract for hire was signed without a stipulation as to the time of payment, whether immediate or delayed? [Response]: If the local custom of that particular town is to hire for an immediate payment, then it would be legitimate to demand such payment forthwith. Otherwise, if the custom in that country approves of a delayed payment, then, in my opinion, it is forbidden.[34]

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[30] *Ibid.*, 7:40; Majlisī, *Milādh al-Akhyār*, 11:396; Sughdī, *Al-Nutaf*, 2:573, 892; Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:655–656. Even if the contract expires during the voyage, her owner is bound to bring the lessee to his final destination.

[31] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:43.

[32] Saḥnūn, *Al-Mudawwana*, 4:410.

[33] Mohammad H. Kamali, *Islamic Commercial Law* (Cambridge: Islamic Texts Society, 2000), 110–116.

[34] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228; Raṣṣāʿ, *Sharḥ Ḥudūd Ibn ʿArafa*, 2:520–521; Qarāfī, *Al-Dhakhīra*, 5:387; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:550–551.

Ibn Ḥabīb[35] argues that freight charges are collectable in proportion to the distance covered.[36] Conversely, Ibn al-Qāsim, as stated in the *Mudawwana*, does not approve of such an arrangement. However, in a contract where the sum is paid promptly, one must specify [the payment arrangements] in the leasing contract. Ibn Ḥabīb also cited Ibn al-Qāsim in the *Wāḍiḥa* as saying that such a specification in the latter's opinion is disallowed. Ibn Ḥabīb holds: We do not ratify it, but contend that if the leasing contract were to be contingent upon collecting a specific portion [of cargo], it must be delivered forthwith to the lessor to set his seal explicitly and formally to the leasing transaction. The lessee must disregard the customary practice of a particular town, whether it approves of postponing the freight charges or paying it in advance.[37] Also, one of Mālik's colleagues, whom I trust, told me: Whoever hires [the services of a lessor] for fixed *dīnār*s, as Ibn al-Qāsim holds, it is inappropriate, in my view, to delay the payment due for one or two days, unless the lessee makes a provision to guarantee its delivery, or pledges delivery in the custody of a neutral third party [43*v*.]. In this case, if the lessee were to sell the cargo to someone else and repayment falls due, he would be obligated to procure the same.[38]

One of Mālik's rulings states: Hiring the service of a ship owner to transport foodstuff from one town to another by paying him part of the consignment as consideration is lawful, so long as the ship owner collects his share at the point of embarkation.[39] The lessee cannot stipulate that the lessor postpone delivery of that portion of the cargo until the destination is reached. If he so stipulated, it would be illicit, because he has hired him with the promise to pay that specific portion of foodstuff at another town (port of call); such a stipulation invalidates the lease agreement. If the shipper or the ship

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[35] Abū Marwān ʿAbd al-Malik Ibn Ḥabīb Ibn Sulaymān Ibn Hārūn Ibn ʿAbbās Ibn Murdās al-Salamī al-Qurṭubī (174–238/790–853), a most learned Andalusian jurist, was born in Elvira and settled in Cordova. Shīrāzī, *Ṭabaqāt al-Fuqahā'*, 162; Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 4:122–142; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 2:8–15; ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 6:390–391; Makhlūf, *Shajarat al-Nūr*, 74–75; Zirkilī, *Al-Aʿlām*, 4:302; Muḥammad Ḥajjī, *Mawsūʿat Aʿlām al-Maghrib* (Beirut: Dār al-Gharb al-Islāmī, 1990), 1:199.

[36] Ibn Ḥazm, *Al-Muḥallā*, 7:26.

[37] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:92; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:499–501.

[38] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228.

[39] Ibn Ḥazm, *Al-Muḥallā*, 7:26.

owner does not so stipulate, and both keep silence on this matter, the hire is valid because the lessor is not prevented from collecting his portion of the cargo. Such an arrangement falls in the same category as a stipulation that the lessee could not claim it unless the destination was reached. Ibn al-Qāsim holds: If the ship owner does not stipulate when he may collect his portion, and if the food owner does not make a provision (19) to pay him at the moment the agreement is concluded, and neither objects after the agreement is made, the contract of hire will be invalid unless the place of payment is fixed.[40] [Moreover, consider a case] where a ship foundered *en route* and the foodstuffs were entirely lost. [Response]: If the foodstuff owner claims that the contract took effect when a lessor collected his portion of the cargo at the point of embarkation in order to secure [the shipping charges], whereas the ship owner protests that he neither leased the ship nor was to receive payment for the voyage until arrival at the destination, then, in such a case, the statement of the owner of the foodstuff is presumed to be true because he has presented a *prima facie* case [based upon the lessor's acceptance of his portion]. Furthermore, the burden of proof rests on the ship owner to corroborate his allegation concerning the conditions imposed by the owner of the foodstuff. He must prove that the lessee imposed an illegal precondition that he would not collect his share except after arrival. Otherwise, he is liable for that portion of foodstuff after its owner swears in the name of God that such provision was not imposed upon the ship owner, as the latter claimed. [By law], the lessor procures his share of the shipment at the port of embarkation because this is his remuneration, and no other freight is to be paid to him until the port of destination is reached. From Ibn al-Mawwāz's book and other [legal sources], Mālik is quoted to this effect: There is no prohibition against making a profit on the lease of a ship, such as when a man rents a ship and then subleases her to a third party at the same rate or more.

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[40] Wansharīsī, *Al-Miʿyār*, 8:306; Abū al-Qāsim Ibn Sarrāj al-Andalusī, *Fatāwā Qāḍī al-Ǧamāʿa* (Abū Dhabī: Al-Majmaʿ al-Thaqāfī, 2000), 198–200; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:525: It is permissible to pay the ship owner in kind on the condition that he collects his portion whenever he wishes.

III. *Chapter on Obstacles to Execution of the Concluded Contract of Affreightment and to Reaching the Destination; Arrangements Regarding Freight Charges*

If a person charters [a ship] from a ship owner at a time favorable to travel by sea, but the wind then ceases to blow; or they are kept from boarding for one reason or another such as an impediment by local authorities or any other obstacles for the duration of the period when seafaring is safe, and, subsequently, the navigation season draws to its end, and winter arrives and with it the hazardous treachery of the sea; or some fear arises on account of the turbulent sea, freebooters, a foreign enemy, or the like; if any of these obstacles arises and is authenticated, then the leasing contract between the ship owner and shipper would be nullified. Whoever [44*r.*] seeks to depart under these worrisome and risky circumstances will not be entitled to do so. If either party to the contract, a lessee or a lessor, refuses to sail and insists on nullifying the contract, he will be entitled to do so—be he a lessee or a lessor—inasmuch as what we have stated is confirmed.[41]

(20) Muḥammad Ibn ʿUmar al-Iskandarānī[42] was asked: What if they arrived at their intended destination but encountered the enemy [there]? Response: They should head back to some Islamic coastal areas until God Almighty delivers that captive land for which they intended to sail; the contract remains valid. Whoever wishes to unload his cargo from the ship may do so after paying the freight charges to the ship owner. The deterrence of the enemy equals the deterrence posed by a rough sea that could prevent [ships] from setting out; this means that the leasing contract remains valid between them.[43]

Ibn Ḥabīb holds: What if they, after covering part of the distance, encounter an extreme and incomparable peril, so that the danger is obvious, and the lessee wants to proceed, while the lessor does not, or vice versa? [Response]: If the passage is indisputably blocked and becomes impassable, with no hope of relief for days on end, which

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[41] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228; Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:646.

[42] Abū ʿAbd Allāh Muḥammad Ibn ʿUmar Ibn Yūsuf Ibn ʿĀmir al-Kinānī al-Andalusī al-Iskandarānī (d. 310/923). See Introduction, 21–22.

[43] ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:526; Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:651–654; Wansharīsī, *Al-Miʿyār*, 8:302–305.

would inflict losses on all parties or on one of them, the leasing contract would be nullified and they should settle the account by mutual agreement. He adds: If they anchored at an uninhabited place, where the lessee did not reap any benefit from the hire [of the ship], the lessor should reimburse the claimant (shipper). [But, they have to consider whether] the safely guarded place is either located near or beyond the destination. If the nearest safely guarded place is located within arm's reach [a short distance from the destination], the ship owner is entitled to collect a comparable [the contracted] freight. If he sailed beyond the destination, he should collect a comparable freight, as well as additional amount for the difference in increase distance traveled. Aṣbagh[44] has also clarified to me the issues raised by those who sign a contract to lease a ship at a time when traveling by sea is unfavorable, in winter or the like, provided that they depart at that particular time, and no provision is made for waiting for a favorable sea on which people can travel safely. [Response]: This is illicit and constitutes a basis for invalidating the contract of lease, for their boarding at that moment in time is risky, and the Prophet—may God bless him and grant him salvation—has ordained against risk-taking (*gharar*).[45] However, if, upon signing the lease, they stipulated that they would wait until such time as the sea becomes favorable for a round trip journey, this would be lawful unless they have not signed the contract for a specific ship. But if they paid the freight in advance and their departure is postponed to a time when it is favorable to travel by sea, be it a week or a half-month roughly, this would be acceptable and the payment [contract] is permissible. However, if the waiting period extends to two months or more, then it is prohibited (21) to pay the freight. There is nothing illegal about

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[44] Abū ʿAbd Allāh Aṣbagh Ibn al-Faraj Ibn Saʿīd Ibn Nāfiʿ al-Miṣrī (d. 225/840) was a disciple of Ibn al-Qāsim, Ibn Wahb, and Ashhab, and the first Egyptian generation Mālikī jurists. His grandfather Nāfiʿ ʿAtīq Ibn ʿAbd al-ʿAzīz Ibn Marwān Ibn al-Ḥakam was the governor of Egypt during the Umayyād caliphate. Kindī, *Al-Wulā wal-Quḍā*, 434–435; Shīrāzī, *Ṭabaqāt al-Fuqahā'*, 153; Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 2:17–22; ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 1:361–362; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 1:299–300; Ibn Khallikān, *Wafiyyāt al-Aʿyān*, 1:217; Suyūṭī, *Ḥusn al-Muḥāḍara*, 1:192; Makhlūf, *Shajarat al-Nūr*, 66; Zirkilī, *Al-Aʿlām*, 4:336; Ḥajjī, *Aʿlām al-Maghrib*, 1:191.

[45] Qarāfī, *Al-Dhakhīra*, 10:378; Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:646; Wansharīsī, *Al-Miʿyār*, 8:299: If the season of navigation has elapsed and traveling by sea becomes risky, the contract can be abrogated by either party.

entering into contract without attaching a timetable, provided it is a guaranteed lease service not assigned to a specific ship. Under these circumstances, it is lawful to enter into a contract and pay the freight on condition that they undertake the voyage during the season of navigation and pay the charges in advance. However, if the departure schedule is far off into the future, then paying the freight is lawful, if the service is guaranteed.[46]

Muḥammad Ibn ʿUmar al-Iskandarānī frequently cites a *responsum* attributed to [44*v*.] Mālik and Ibn al-Qāsim, stating: Paying the freight in advance, in compliance with *juʿl* (a contractual condition)[47] is reprehensible because the freight is only payable after the destination has been reached. Until then it is reprehensible to pay the freight.[48] ʿAbd Allāh Ibn Nāfiʿ,[49] Aṣbagh, and Ashhab[50] disagreed with them and held: Paying the freight in advance is permissible; [if the terms of the agreement are carried out, the ship owner] is entitled to collect the freight commensurate with the distance traversed. They base this rule on the principle relating to land journeys, where the freight charges are paid commensurate with the distance covered. Nevertheless, Aṣbagh added: If the vessel sailed in stormy seas and the wind hurled her back [to the port of origin], the ship owner would not be entitled to collect the freight, since the distance cov-

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[46] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228; Qarāfī, *Al-Dhakhīra*, 5:485; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:642, 648–650, 656; Wansharīsī, *Al-Miʿyār*, 9:117; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:499–501.

[47] *juʿl* or *jiʿāla*—A contract in which the entitlement to wages depends upon completing the task; that is, the contract is entered into by independent contractors. In other words, it is *ijāra* (hire) in which the acquisition of benefits is probable. For further details on this topic see Noble, "Principles of Islamic Maritime Law," 97–102.

[48] Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:641.

[49] ʿAbd Allāh Ibn Nāfiʿ al-Sāʾigh al-Makhzūmī (d. 186/802), attended Mālik's sessions and succeeded Ibn Kināna as *muftī* in Medīna. Shīrāzī, *Ṭabaqāt al-Fuqahāʾ*, 153; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 1:409–410; ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 6:51–52; Makhlūf, *Shajarat al-Nūr*, 55.

[50] Ashhab Ibn ʿAbd al-ʿAzız Ibn Dāwūd Ibn Ibrāhīm al-Qaysī (145–204/762–819) was a companion of Mālik and a highly learned Egyptian scholar. Muḥammad Ibn Idrīs al-Shāfiʿī, the founder of the Shāfiʿī law school, said about him: "Egypt did not introduce a scholar who is more versed in jurisprudence than Ashhab." Kindī, *Al-Wulā wal-Quḍā*, 346, 386; Shīrāzī, *Ṭabaqāt al-Fuqahāʾ*, 150–151; Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 3:262–271; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 1:307–308; ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 1:359–360; Ibn Khallikān, *Wafiyyāt al-Aʿyān*, 1:215–217; Amari, *Al-Maktaba al-Ṣiqilliya*, 186; Makhlūf, *Shajarat al-Nūr*, 59; Zirkilī, *Al-Aʿlām*, 1:335; Ḥajjī, *Aʿlām al-Maghrib*, 1:179.

ered on the great expanse of sea is in the realm of the unknown, while the distance upon sailing in cabotage is known [measurable].[51]

From the *ʿUtbiyya*: Abū Zayd narrated an account ascribed to Ibn al-Qāsim about someone who hired a ship owner to convey cargo to Alexandria. After covering part of the route, the vessel came to a standstill in shallow water. Response: He should pay him proportionate to the distance covered. He was then asked: What would happen if the ship owner assumed that he is committed to convey the cargo, and therefore he subleased [a vessel] and brought it to Alexandria? Response: No payment is due to the ship owner, because it is within his right not to do so; he must refund the lessee for the remaining distance. He was further asked: What if the vessel came to a halt at an uninhabited location where no authority exists, but the ship owner feared loss of cargo and so he subleased [another ship]? Response: Perhaps [he is entitled to collect the whole freight], and this case is distinguishable from the former.[52] ʿĪsā also recounted a similar ruling accredited to Ibn al-Qāsim concerning someone who hired a ship for Alexandria. When he arrived at the canal he found it empty of water. Response: The freight is payable in proportion to the distance covered.

Saḥnūn was asked: What if a lessee hired [a vessel] for shipping cargo to some town, but, upon covering half the distance, he was informed that he could not enter the intended port of debarkation? Response: Yes, in such a situation (22) the lease is nullified and [the shipper] must indemnify [the ship owner] in accordance with the distance traversed.[53] Others held: If after reaching midway he discovered that he could not enter the destination, as Saḥnūn has suggested, and headed back to the port of departure, the lessee must pay half the transportation charges for the outward bound trip and a comparable freight for the return trip.

Also from the *ʿUtbiyya*: Aṣbagh was asked about those who charter ships to ship cargo to a particular town, but, after a month or

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[51] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:111; Ibn Rushd, *Bidāyat al-Mujtahid*, 282 (English page) [*The Distinguished Jurist's Primer*, Trans. by Imran Ahsan Nyazee (London: Garnet Publishing, 1996), 2:282; Qarāfī, *Al-Dhakhīra*, 5:485; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:525–526; Wansharīsī, *ʿUddat al-Burūq*, 554–555.

[52] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:100–102, 109; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:63–65; Qarāfī, *Al-Dhakhīra*, 5:485–486.

[53] Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:132; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228.

so, the winds hurl them back to the port from which they embarked. What if they were still stranded on the vastness of the sea, or arrived at a port village and then were driven back to the high seas, or sailed by it when they could have disembarked, if they desired? Response: If they were stranded on the vastness of the sea that closed upon them until the wind drove them back [to the embarkation port], they are absolved from paying the freight because they did not reap any benefit, nor did they reach a place where they could profit from the sale of their goods and allow them to pay the freight commensurate with the distance covered to that location.[54] However, those who anchored at a port village and subsequently resumed sail would be obligated to pay the freight in proportion to the distance covered to that village; it is just as if the vessel were wrecked, but the cargo, or part of it, escaped damage. Then, they would have to pay the freight in proportion to the profit they made. But were they to arrive at a village and decide not to disembark, although they were able to land, or the contrary, the rule is as follows: If they drew very close to the shore and reached a point [45*r*.] where they felt safe and not threatened by the wind, because of their proximity to the shore, and having dropped anchor and wished they could have anchored there, but then the winds beat them away, the freight due by those shippers is commensurate to the distance [covered] to that location, as we have already indicated. But, if they sailed away from the coast, to where they could not feel secure but felt threatened, and therefore headed back, they would be exempt from paying the freight. However, where the wind did not overtake them, but [the ship] turned back owing to the threat of pirates or Byzantines [Rūm],[55] or at the request of the passengers, then the shippers must pay the freight. But, if the ship owner was the one to turn them back against their wishes, no freight is due him. If the passengers ask to return, because of fear of pirates, Byzantines, or sea turbulence, the contract shall be nullified as if had made no

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[54] Khushanī, *Uṣūl al-Futyā*, 148; Qarāfī, *Al-Dhakhīra*, 5:485; Awzajandī, *Fatāwā Kāzī Khān*, 2:286. The lessee is exempted from paying the freight if he did not accompany his cargo.

[55] Byzantines or Italians, in a broader context refer to Europeans. One should remember that during this period of time, the Byzantine Empire was the most dominant Christian naval power in the Mediterranean.

profit from the sale of their cargo.[56] If they retreated to a place other than that from which they boarded. After proceeding part of the way, but could not disembark safely and make any profit on the journey, he (the ship owner) may cast anchor at this safe port, (23) if he is unable to proceed. However, they have no right to head back to the place from which they departed; the ship owner would be entitled to collect the freight proportionate to their proceeds as well as the distance covered. If some passengers on the ship feared for their lives on the voyage toward the original destination and were advised against their will not to discharge [and sell] their goods in a place other than the destination, then they would have to pay the rental due; it is more to my liking if they are charged for the outward bound voyage up to the point where they landed, at a fee commensurate with the rate of the original contract, in addition to the agreed upon freight for the return trip.[57]

Yaḥyā Ibn ʿUmar[58] holds: If their hire of this ship was concluded upon sailing in cabotage in sight of the coast—for example sailing from Miṣr (Egypt/Fusṭāṭ) to Ifrīqiya (Tunisia)—but the winds blew them back to the embarkation port, they would have to pay the freight proportionate to the distance traversed.[59] However, if their lease provided that they would sail across the high seas, as, for instance, to sail from Sicily to Ifrīqiya or Andalusia, but the winds turned them back to the port from which they departed, they would be exempt from paying the shipping fees provided they made no profit on the route the ship sailed.[60]

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[56] Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:650–651; Raṣṣāʿ, *Sharḥ Ḥudūd Ibn ʿArafa*, 2:525. It was suggested that if the pirates captured the cargo but released the vessel, the cargo owners have to pay the freight; they are exempted from paying the freight if the pirates seized the vessel, too.

[57] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:109–110; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:147–150; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:642; Kindī, *Al-Muṣannaf*, 21:155; Shammākhī, *Īḍāḥ*, 3:580–581.

[58] Abū Zakariyyā Yaḥyā Ibn ʿUmar Ibn Yūsuf al-Kinānī al-Andalusī (213–289/828–902) was a Cordovan jurist and the author of many jurisprudential works. He traveled in Muslim countries in the East, arrived in Qayrawān, and spent his last years in the coastal *ribāṭ* of Sūsa, where he joined Saḥnūn. Shīrāzī, *Ṭabaqāt al-Fuqahāʾ*, 163; Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 4:357–364; Mālikī, *Riyāḍ al-Nufūs*, 1:396–406; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 2:355–357; Amari, *Al-Maktaba al-Ṣiqilliya*, 187–188, 192–194; Makhlūf, *Shajarat al-Nūr*, 73; Zirkilī, *Al-Aʿlām*, 9:201.

[59] Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:641–642.

[60] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:111, 112; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228; Qarāfī, *Al-Dhakhīra*, 5:485; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:597.

Abū Muḥammad Ibn Abī Zayd[61] was asked for his opinion about a group of shippers who had transported their cargo on a ship for a fixed freight from Sicily to al-Mahdiyya. The ship [first] sailed to Iqlībiya[62] on the coast of Ifrīqiya.[63] From there she continued on her voyage toward al-Mahdiyya. While sailing, she encountered a strong wind blowing contrary to the current with which they had been sailing. The sea became tumultuous, and therefore they jettisoned part of the cargo. Then they sailed back to Sicily in consternation seeking safety. Will the shippers have to pay the freight or not? What if part of the cargo was damaged? How should they settle the controversy among themselves, as to whether the damage [to the cargo] resulted from the seawater (24) before, or after being jettisoned? Is the ship included in the calculation of general average? If a group of shippers disembarked at the port where they anchored on the coast of Ifrīqiya, do they have to pay the freight charges? What [would be the payment due] if they disembark, leave their cargo behind, travel to al-Mahdiyya, and await their cargo to follow? Should the contribution of the freemen be valued[64] at the same rate as the slaves? Likewise, are a Muslim's slaves valued like those owned by [45*v*.] an infidel? Response: Neither the freemen traveling on board nor the seamen and service workers on the ship, whether slaves or freemen, are subject to contribution. However, articles acquired for commercial purposes, such as foodstuffs, goods, and slaves owned by Muslims or infidels, are subject to contribution; the ship's servants are excluded from distribution calculations.[65]

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[61] Abū Zayd ʿAbd Allāh Ibn ʿAbd al-Raḥmān al-Qayrawānī (310–386/922–996) is the author of *Al-Nawādir wal-Ziyādāt ʿalā mā fī al-Mudawwana min ghayrihā min al-Ummahāt* (Beirut: Dār al-Gharab al-Islāmī, 1999).

[62] Iqlībiya (Qulaybiyah/Kélibia) is a fortified coastal castle that lies in the vicinity of Carthage on the coast of Ifrīqiya. See Idrīsī, *Nuzhat al-Mushtāq*, 1:276, 301, 303; Yāqūt, *Muʿjam al-Buldān*, 1:237.

[63] Khalilieh, "*Ribāṭ* System and Its Role in Coastal Navigation," 212–225.

[64] *Qīma*: The value of a thing as distinguished from its price.

[65] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 235, 238; Qarāfī, *Al-Furūq*, 4:11; 5:488: If there were only human beings on board the ship, it is prohibited to sacrifice any of them for the sake of the rest even if he were a *dhimmī*. Al-Ṭarṭūshī (d. 520/1126) comments on this issue, stating: They shall begin jettisoning cargo followed by the animals for the sake of human souls. This jettison order is imperative when it is necessary. This legal view is also shared by Ibn Ḥazm who forbids jettisoning animals so long as commercial articles remained on board. See Ibn Ḥazm, *Al-Muḥallā*, 7:27.

Regarding the freight, the rules are as follow: If the shippers return to the port of embarkation, no charges should be imposed on anyone on board, neither on his passage nor on his shipment. If the ship is navigable, the charter contract will remain valid unless they breach it or the ship has been pledged as security, in which case the leasing contract would be vitiated if it required the use of a specific ship. Those who went ashore, after traveling part of the distance, would have to pay the freight pro rata, according to the distance traversed. If part of the cargo on board was soaked and ruined and its value therefore diminished, the owners of the jettisoned goods become shareholders in bearing the burden of damage, because whatever damage occurred should be equally shared by all [shippers]; they all become shareholders in the remaining goods, safe or ruined, provided that the damage to them occurred as a result of the jettison and the cargo was intact and unimpaired when it was cast overboard, *i.e.*, whatever damage it sustained occurred only after jettison. Had the cargo allocated for jettison not been cast overboard but had suffered damage due to sea turbulence, then its value would not be assessed based on its imperfect state in Sicily. In addition, if the cargo emerged unscathed and the damage occurred only after casting it overboard, then its price should be assessed at its perfect [state, based on the market prices] at its embarkation point when it was loaded, as mentioned earlier. But, if a strong wind drove them back somewhere down the coast of Sicily, (25) other than to the port of embarkation, or the vessel suffered a wreck there, then no freight is payable to the ship owner unless they reach the destination afterwards. The issues are controversial, but this reasoning is closer to my thinking.

In his book[66] Abū Muḥammad relates an opinion attributed to Ibn ʿAbdūs[67] about a group of people who chartered a vessel to sail from Alexandria to Tripoli [Libya] or elsewhere, but the winds drove them to Sūsa (Sousse). The cargo owner or his agent, a native of

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[66] Probably, the author refers to Abū Muḥammad Ibn Abū Zayd's book *Mukhtaṣar al-Mudawwana*.

[67] Muḥammad Ibn Ibrāhīm Ibn ʿAbd Allāh Ibn ʿAbdūs Ibn Bashīr (202–260/817–874) is a jurist, a mystic (*ṣūfī*), and an outstanding follower of the third generation of Mālikī jurists in Ifrīqiya. Shīrāzī, *Ṭabaqāt al-Fuqahāʾ*, 158; Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 4:222–228; Mālikī, *Riyāḍ al-Nufūs*, 1:360–363; Makhlūf, *Shajarat al-Nūr*, 70; Zirkilī, *Al-Aʿlām*, 6:183; Ḥajjī, *Aʿlām al-Maghrib*, 1:210.

Tripoli or elsewhere, accompanied it. Response: It is the same. If he wishes, he can unload his shipment at Sūsa with no additional charges on account of the increased distance. However, if he desires to return to Tripoli, with the cargo or without it, he is at liberty to do so since his contract terms so stipulate; he is not allowed to learn about the market prices at Sūsa to determine whether the cargo would fetch a greater or lesser price.[68]

Abū Saʿīd Ibn Akhī Hishām[69] was asked about a group of people who hired a ship to transport them from Sicily to Sūsa. She anchored in Tūnis. Subsequently, violent gales, sea turbulence, and whirlpools overwhelmed them and prevented them from sailing. The cargo prices at the location at which they disembarked were approximately comparable to those in Sūsa, the destination stipulated in the leasing contract. Response: If they landed in a town located beyond Sūsa and its periphery, *i.e.*, they passed Sūsa, and decided to take advantage [of the opportunity to] stay in a place near there, and the market situation [46*r.*] was approximately comparable to that of Sūsa, then the merchants must pay the freight agreed upon for Sūsa to the ship owner. If, however, they encountered a significantly more favorable commercial situation at this town, then the merchants would owe an increased fee to the ship owner, commensurate with the benefits they reaped at their new destination. Some of our fellow jurists hold that, in such cases, the merchants are at least to be charged a fee lower than for their share of the additional profit they reaped, or additional freight (26) for the distance traveled beyond Sūsa; some of our fellow jurists absolve the merchants from paying the freight for the increased distance. If the market situation at their point of debarkation is manifestly less favorable than that of the market in Sūsa, they owe nothing at all to the ship owner, and the agreement between the parties becomes void. If they had headed for a location other than the point where they anchored—for instance if a ship leased for Sūsa but landed in Barqa, Sirte, or some other

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[68] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:110; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 232; Qarāfī, *Al-Dhakhīra*, 5:491; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:526; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:646–647; Wansharīsī, *Al-Miʿyār*, 8:308.

[69] Abū Saʿīd Khalaf Ibn ʿUmar, also called ʿUthmān Ibn ʿUmar, and by others ʿUthmān Ibn Khalaf known as Ibn Akhī Hishām al-Khayyāṭ (299–371/911–981) was a Qayrawānī scholar of the sixth generation of Malikī jurists in Ifrīqiya. Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 1:347–349.

remote town—the merchants would then have to pay the ship owner in proportion to their profits. If the market prices are higher than or identical to those in Sūsa, the result will be the same as I have ruled earlier. Success granted by God.[70]

IV. *On the Destruction of the Ship and/or Cargo during the Voyage or at the Destination; the Ruling related to Unloaded Cargo, Identified or Unidentified, Intact or Soaked—and the Claim in Respect of Freight*

I have read a legal opinion ascribed to Muḥammad Ibn ʿUmar al-Iskandarānī stating: Our fellow jurists hold controversial opinions as to a vessel disabled somewhere *en route* and her cargo is either intact or ruined. Mālik and Ibn al-Qāsim hold: The same rule applies in each case. The ship owner has no right [to collect the freight] for whatever distance has been covered, be it short or long, because the regulations governing the carriage by sea, according to Mālik and Ibn al-Qāsim, require the payment only upon arrival [at the destination].[71] Mālik and Ibn al-Qāsim distinguish between the rules governing carriage of goods by sea and those governing carriage by land, and hold that the remuneration for land freight depends on the distance covered. They also decree that he (the ship owner) has no right to collect the freight unless he reaches the designated port.[72] Muḥammad Ibn ʿUmar holds: The opinion of Mālik and Ibn al-Qāsim that the freight is only payable upon arrival [at the destination] is preferable to me.

Saḥnūn related an edict attributed to Ashhab and Ibn Nāfiʿ ruling that the ship owner is entitled to collect the freight commensurate with the distance covered, be it by sea or on land.[73] Saḥnūn advocated this principle and used to require merchants to pay the freight charges, (27) even if their goods were lost, which is a calamity

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[70] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:111–112; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:656; Wansharīsī, *Al-Miʿyār*, 8:310.

[71] Saḥnūn, *Al-Mudawwana*, 4:493; Ibn al-Jallāb, *Al-Tafrīʿ*, 2:188; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228; Ibn Ḥazm, *Al-Muḥallā*, 7:26; Khushanī, *Uṣūl al-Futyā*, 148; Ibn ʿAskar, *Ashal al-Madārik*, 2:334.

[72] Ibn al-Jallāb, *Al-Tafrīʿ*, 2:188.

[73] Saḥnūn, *Al-Mudawwana*, 4:493, 497; Ibn al-Jallāb, *Al-Tafrīʿ*, 2:188; Khushanī, *Uṣūl al-Futyā*, 148; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228.

that afflicted merchants. Contrary to them, Aṣbagh proclaims that if the ship sailed most of the distance on the high sea, but the winds turned her back, and subsequently the ship was disabled, no freight is due the ship owner, because the distance on the high seas is indefinite and nobody can estimate the distance covered. If, however, the ship sailed by cabotage and covered most of the distance, in such an instance he agrees with Saḥnūn, Ashhab, and Ibn Nāfiʿ, who entitle the ship owner to collect the freight commensurate with the distance traversed. Ibn Ḥabīb affirms Mālik's and Ibn al-Qāsim's judicial reasoning and holds that the freight is payable only at the destination. As we have established, he distinguishes between the regulations governing the carriage of goods by sea and those governing carriage by land.[74] Saḥnūn relates in the *ʿUtbiyya* an opinion ascribed to Ibn al-Qāsim, stating: If a ship was chartered to transport foodstuffs but filled with water after covering half of the distance and still reached the coast, the ship owner would not be entitled to collect the freight.[75] An enactment, cited in Ibn al-Mawwāz's book, rules: If the vessel, with her contents, was damaged and the agreement had been signed to lease that specific vessel, then no freight is payable to her owner under those circumstances; the same ruling applies to the vessel which reached the intended destination without the cargo being unloaded [46*v*.] from her.

In the *Mudawwana*, Mālik decrees: Whoever chartered a ship that subsequently sank with her contents of foodstuffs and other cargo, after covering two-thirds of the distance, owes nothing to her owner. Mālik holds that the freight is payable only upon arrival at the destination.[76] Notwithstanding, Ibn Nāfiʿ entitles the ship owner to collect the freight in accordance with the distance covered.[77] Ibn al-Mawwāz holds: There is no difference of opinion among our fellow jurists regarding a case where a vessel reached her designated destination and a disaster befell her instantly upon arrival, so that it was impossible to discharge [the shipments] owing to sea roughness and the damage to the vessel: given these facts, no payment is

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[74] Saḥnūn, *Al-Mudawwana*, 4:493, 496.

[75] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:111; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 8:498; Nuwayrī, *Al-Ilmām*, 2:249–250.

[76] Saḥnūn, *Al-Mudawwana*, 4:493–494; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:596–597.

[77] Saḥnūn, *Al-Mudawwana*, 4:497; Qarāfī, *Al-Dhakhīra*, 5:485.

due to the ship owner; the rule is the same as the rule applying to a vessel that has not reached her destination. This is in accord with the holdings of Mālik and Ibn al-Qāsim.[78] However, if she anchored at the destination, but the shippers engaged in matters other than unloading the cargo from the vessel, though they could have done so—that is, if they slackened until a disaster befell them and the vessel was disabled, the lessor is entitled to collect the whole freight, since the negligence was theirs. But, if she anchored in the berth and the shippers instantly began to discharge the cargo without delay, and part of the shipment was put ashore, after which a calamity befell them that prevented the unloading of the rest of the cargo, and the ship was disabled, those whose shipments were saved must pay the shipping charges, whereas no freight is payable for the ruined goods; this rule is the same as the rule that applies to a vessel that has not reached her destination. Ibn Abī Zayd asserts: (28) [For] whatever is ruined at anchorage, owing to wreckage or jettison before mooring at the final landing terminal/quayside [*al-nuzūl*], no freight is payable to the ship owner unless the final destination is reached and the cargo safely delivered. These are the controversial opinions I have read on this issue.[79]

Yaḥyā Ibn ʿUmar was asked about those people who lease a vessel, load her, and set sail from the point of anchorage as God intended. Thereafter, the wind has turned them back to the point from which they embarked or to some place other than the port of origin. Response: If their lease was concluded upon crossing the open sea, as from Sicily to Andalusia, but, after sailing on the high seas the wind drove them back to the port at which they embarked, whereupon the vessel was wrecked, or her owner expressed a desire to stay [there], and so the shippers did not make a profit from the voyage, then no freight is due to the ship owner.[80] If, on the other hand, their lease was concluded upon sailing in sight of the coast, such as sailing from Egypt to Ifrīqiya, or somewhere like that, and the vessel traversed a certain distance and was then disabled, the ship owner is paid in accordance with the distance covered. Aṣbagh approves of this ruling, too.[81]

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[78] Qarāfī, *Al-Dhakhīra*, 5:485–486; Wansharīsī, *Al-Miʿyār*, 8:306.

[79] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:102; Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:656; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 228–229.

[80] Wansharīsī, *Al-Miʿyār*, 8:297–298.

[81] *Ibid.*, 8:310–311.

Yaḥyā Ibn ʿUmar was asked: Consider a case where a vessel was wrecked and the cargo or a part of it was jettisoned into the sea at the port at which they embarked, or after traversing part of the way to the intended destination, or in the vicinity of their intended destination. Response: If the vessel was wrecked and the cargo was jettisoned into the sea in the vicinity of the port of embarkation, no freight is payable to the ship owner at all. If the vessel, however, sustained damage *en route*, as she sailed in sight of the coast to their designated port, and part or all of shipment was cast overboard, the freight is payable to him in proportion to the distance covered, after deducting the charges for the jetsam. If the jetsam was not salvaged [47*r.*], no freight is payable to the ship owner. Likewise, if a part of the goods was jettisoned into the sea, no freight is due to the ship owner. Similarly, if the shipment was jettisoned at its intended destination, or near it, and their lease was executed upon crossing the open sea, such as when sailing to Sicily, the ship owner is entitled to collect the freight proportionate to the distance covered; no freight is due to him for the unsalvageable cargo. Regarding the freight charges for the wet salvaged cargo, their value is deducted from the fees owed by the cargo owner in accordance with their degree of wetness. When calculating the shipping fees, consider the cargo's value in its perfect state and then after wetting. If it has lost a quarter [of its value], then the freight charges should be decreased by a quarter, and if the amount is less or more, the shipping fee then should be collected from the shipper in the proportion I have discussed.[82]

(29) Yaḥyā Ibn ʿUmar was further asked: Consider a case where a part of the distance is covered, then the ship is wrecked at a place other than the port from which they embarked. Is the ship owner entitled to collect the freight? Response: You have to consider the profit a shipper could make and the distance traversed. If he makes a profit on the trip before they have to turn back, but the market prices at the place where the vessel was disabled are less favorable than at the destination, the ship owner is to collect the freight commensurate with the distance covered, after evaluating the intact and wet cargo, as I have discussed. However, if the cargo owner does not derive any profit as a result of the trip, then he is exempt from

[82] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 229.

paying any freight. The freight is thus payable only if the cargo is sold. However, if it was totally lost, no freight is due to the ship owner.

Ibn Ḥabīb holds: If the ship were to sink in the deep, then no freight is payable to the ship's lessor at all.[83]

Aṣbagh relays an opinion attributed to Abī Zayd: If the ship was disabled somewhere *en route*, but her contents remained undamaged, the shipper must pay the freight proportionate to the distance covered, since he benefited from the transport, saved time, and was brought closer to his ultimate destination; he is, thus, held accountable for that. Furthermore, the lessor does not have to convey the cargo unwillingly aboard another vessel, if the leasing contract designated shipment aboard a specific vessel.

Saḥnūn transmits an account attributed to Ibn al-Qāsim in the *ʿUtbiyya* concerning a person who had chartered a ship from Alexandria to Fusṭāṭ. She sank somewhere *en route* and half of the wheat cargo was salvaged and transported aboard another ship. [Response]: The owner of the first ship is entitled to collect the transportation charges for the salvaged portion of the wheat commensurate with the distance covered to the point where the ship sank.[84]

From the book of Ibn Saḥnūn:[85] The *qāḍī* of Tripoli wrote to Saḥnūn to inquire about a vessel wrecked off Barqa. Six consignments were brought from her to Tripoli. A person who brought these consignments claimed they were salvaged from that wrecked vessel. Some of these bales were identified by their owners, while others were unidentified, since the owners' names had been obliterated.[86] The goods whose owners were unidentified were sold for a sum of *dīnār*s. There was a lease for the bales transported [to Tripoli].

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[83] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:107.

[84] *Ibid.*, 7:111; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 8:498; 9:147–150; Nuwayrī, *Al-Ilmām*, 2:249–250.

[85] Abū ʿAbd Allāh Muḥammad Ibn ʿAbd al-Salām (Saḥnūn) Ibn Saʿīd Ibn Ḥabīb al-Tanūkhī (202–256/817–870), a Qayrawānī jurist of the third generation. In 235/849 he moved to the Mashriq [East], died on the coast and his corpse was transferred and buried in Qayrawān. His works include: *Ajwibat Muḥammad Ibn Saḥnūn, Al-Risāla al-Saḥnūniyya, Al-Jāmiʿ fī Funūn al-ʿIlm wal-Fiqh, Al-Tārīkh*, and *Ādāb al-Mutanāẓirīn*. Shīrāzī, *Ṭabaqāt al-Fuqahā'*, 157–158; Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 3:204–221; Mālikī, *Riyāḍ al-Nufūs*, 1:344–360; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 2:169–173; Amari, *Al-Maktaba al-Ṣiqilliya*, 186–187; Makhlūf, *Shajarat al-Nūr*, 70; Zirkilī, *Al-Aʿlām*, 7:76; Ḥajjī, *Aʿlām al-Maghrib*, 1:208.

[86] For packing and names of shippers, see Khalilieh, *Islamic Maritime Law*, 78–79.

Then I called for the identified shippers whose bales remained intact to make an appearance, so that I could look at the state of their merchandise, (30) but they declined to take them back and said: "We donate part of our shares of the salvaged bales to [religious endowments]. Go ahead and sell [that part of the goods] because the water penetrated into portions of it." I took over from him the six bales with their lease and retained the remainder. The ship owner showed up demanding the freight charges. He (Saḥnūn) wrote back to him: If the leasing contract was originally executed upon sailing from Miṣr [Fusṭāṭ] [47*v.*] to Tripoli, then the opinion of Mālik applies and rules that the freight is payable upon reaching the destination; however, Ibn Nāfiʿ approves of paying him (the lessor) in accordance with the distance covered. But in your inquiry, there were loads that safely arrived in Tripoli. This issue is similar to the question addressed to Mālik concerning the wage of a borer. [If] a borer dug a well but did not bring his task to a successful completion, and the owner of the well hired somebody else to complete the digging, the former borer should be paid commensurate with the amount of his work.[87] So is the ship owner, who is entitled to collect the freight in proportion to the profit accruing to the merchants for transporting their goods from Miṣr [Fusṭāṭ] to Barqa; the shipping charges are reckoned commensurate with the profits they reaped from their sales. Concerning the prices of the bales, it is imperative to register the quality of each bale and the price it fetched, and then keep it in storage. If the waiting period is extensive, and the rightful owner does not appear, and the sum [is small enough] that it is not worth holding any longer, the *qāḍī* is authorized to donate its selling price to religious endowments.[88]

Saḥnūn holds: If the ship was disabled before arrival at the destination and the lessees claim to have paid the freight, but the ship owner refutes their allegation, then their testimony for each other is admissible. A similar holding is advocated by al-ʿUtbī in the *ʿUtbiyya*.[89]

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[87] Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 8:498; 9:147–150; Nuwayrī, *Al-Ilmām*, 2:249–250; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:535.

[88] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:113; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 15:358–359, 373; 15:373–374; Nawawī, *Rawḍat al-Ṭālibīn*, 7:194; Ibn Taymiyya, *Fatāwā*, 30:414–416; Ibn Ḥazm, *Al-Muḥallā*, 7:84; Ṭūsī, *Tahdhīb*, 7:219; Ḥillī, *Al-Sarā'ir*, 2:195; Khawansārī, *Jāmiʿ al-Madārik*, 6:72–73; Majlīsī, *Milādh*, 11:418; Kindī, *Al-Muṣannaf*, 18:61, 63; 22:149; Minhājī, *Jawāhir al-ʿUqūd*, 1:407–409.

[89] Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, 1:421.

[Both jurists] compare this case to that of people robbed *en route*, who testify for each other. Other jurists do not approve of the shippers' testimony for each other and rule that there is no imperative legal reason [to validate it], since the lessees, if they seek to prove they have paid the freight charges, can testify for each other against the lessor. Thus, how can it be legal for me to testify for him and he for me, when there is no compelling reason for the testimony of both of us?[90] Ibn ʿAbdūs affirms Saḥnūn's opinion.[91]

V. *On Goods Jettisoned Overboard into the Sea for Fear of Its Roughness; Rules Governing the Value of Jetsam and the Reconciliation of Claims between Owners; Averaged and non-Averaged Articles*

I (Ibn Abī Firās) read a legal opinion attributed to Muḥammad Ibn ʿUmar, concerning a vessel transporting cargo. When the sea turned rough and the danger of drowning became imminent, those on board—consensually or otherwise, in the presence or the absence of the cargo owners—were forced to jettison part of their cargo. Response: Neither Mālik nor Ibn al-Qāsim nor any Mālikī authority, those of Medīna and those of Miṣr, argue that everything thrown from the vessel should be deducted from the goods remaining on the vessel. [The value of] the jettisoned goods should be divided by [the value of] the remaining merchandise—be it a quarter (31) or a third.[92] Those whose goods remained safe are to pay proportionately for those whose goods were jettisoned. The price of the jettisoned goods that is due their owner is based on the amount he actually paid where these goods were loaded onto the vessel.[93] However, this only applies if no price change occurred in the market for the goods. If, however, the market has changed, going either up or down, then

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[90] Saḥnūn, *Al-Mudawwana*, 4:194, 410; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 10:164–165; Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, 1:421; Wansharīsī, *Al-Miʿyār*, 8:64, 305; 10:406; Ibn ʿAbd al-Barr, *Al-Kāfī*, 2:752; Minhājī, *Jawāhir al-ʿUqūd*, 1:294; Ibn al-Mujāwir, *Ṣifat Bilād al-Yaman*, 1:138–139; *Al-Fatāwā al-Hindiyya*, 3:362; 4:476–477; 5:128; Awzajandī, *Fatāwā Kāzī Khān*, 2:350.

[91] ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:525; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:503.

[92] Ṭaḥāwī, *Mukhtaṣar Ikhtilāf al-ʿUlamāʾ*, 3:404; Ghazālī, *Al-Wajīz*, 2:152; Ibn al-Junayd, *Al-Fatāwā*, 198; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 229; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:527; Kindī, *Al-Muṣannaf*, 18:59–61.

[93] Ibn al-Jallāb, *al-Tafrīʿ*, 2:295; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:527.

the purchase price of the goods is ignored, and consideration is given to the [current] value of the goods. Be they foodstuffs, textiles, raw materials, slaves or any other commercial commodity, the price is calculated as of the moment they were taken on board.[94] There is no difference of opinion between Mālik and his fellow jurists concerning goods that a cargo owner acquired for his private possession. No matter what the object, be it a black slave (*ʿabd*), a captive, a jewel that the shipper had crafted, a precious stone that he bought for his family, a slave, a weapon bought for his own private property, [48*r*.] or a *Qurʾān* that he had illuminated for his own possession—this entire category of possession is not taken into account in calculating the value of the jettisoned cargo. Likewise, if the vessel's owner bought slaves to serve on the vessel but did not acquire them for commercial purposes, their value, too, is not to be considered when assessing accounts for the jettisoned merchandise. However, whatever the ship owner bought for commercial purposes is in the same category as that of the merchants: [the value of] the jettisoned goods should be deducted from [the value of] the remaining merchandise.[95] He was further asked: What if a personal item was jettisoned, instead of a commodity? Response: The affliction (loss) would be that of the article's owner rather than the merchant, be it cheap or expensive, since a private possession is excluded from the rules of commerce; the rule applying to private possessions differs from the rule applying to commodities.[96] Similarly, if a private possession

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[94] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 238. Abū Bakr Ibn ʿAbd al-Raḥmān enunciated: "The custom duty paid on goods is not included, and none of our scholars has discussed it since this duty is an official prerogative and it is not refundable."

[95] Ibn Ḥazm, *Al-Muḥallā*, 7:27; Ibn Rushd, *Masāʾil*, 2:1051–1052; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 230; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:527–528; Qarāfī, *Al-Furūq*, 4:9–10; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:643; Nuwayrī, *Al-Ilmām*, 2:243: "Know thou that if, for fear that the vessel may sink owing to her freight and for her safety all her contents or part of them were thrown into the sea in the preference to saving lives rather than materials, the distribution of the jetsam shall include all cargo intended for commercial purposes, regardless of its weight, light or heavy; ordinarily, jettisoning sums of dinars and dirhams is of greater disadvantage. Nonetheless, shares allotted on them are to be distributed similarly to [what is allotted for] the lead and copper. Likewise, the value of things that are forbidden to jettison, such as male and female slaves intended for commercial purposes, is averaged."

[96] Qarāfī, *Al-Furūq*, 4:11: "Abū Ḥanīfa and al-Shāfiʿī, may God's blessing be upon them, ruled: No one aboard the vessel is held liable for the losses except he who jettisons the property of others; however, had he jettisoned his own possession, the affliction (loss) would befall him only."

were thrown overboard, the liability for the loss incurred would be laid upon its owner. Neither Mālik nor his followers, those of Medīna and those of Miṣr, contest this rule, except for Muḥammad Ibn al-Ḥakam,[97] who, when I asked him,[98] replied: I disagree with Mālik and his fellow jurists, concerning the value of the commodities, and rule: The jetsam should be deducted from the remaining goods; the jetsam and intact goods should be evaluated according to their current value at the intended destination.[99]

Muḥammad Ibn ʿUmar recounts: A question[100] was addressed to Aḥmad Ibn Muḥammad Ibn Muyassar[101] of Alexandria about a ship heading for his hometown. On board were commodities belonging to merchants and others. The ship was caught (32) in a rough and tempestuous sea that forced them to jettison part of her contents, including commercial items and private possessions, which were either charged [for] or shipped free. Aḥmad responded: The answers, may God grant us success, for all the questions you have addressed are as follows: Goods and private belongings—whether acquired for commercial purposes or personal usage, and irrespective of whether they were subject to a lease or not—all fall in the same category. They are shareholders in the saved cargoes and jetsam based on their value in the place from which they were shipped.[102] Neither the ship, nor her servants, seamen or freemen are subject to contribution.

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[97] The fourth son of Ibn ʿAbd Allāh Ibn ʿAmīd al-Ḥakam and a member of ʿAbd al-Ḥakam dynasty, died in 268/881. Ṭāher (ed.), *Akriyat al-Sufun*, 31.

[98] The question here is addressed by Muḥammad Ibn ʿUmar, indicating that he was in Egypt prior to the death of Muḥammad Ibn ʿAbd al-Ḥakam in 268/881.

[99] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 236; Qarāfī, *Al-Dhakhīra*, 5:486–488.

[100] This inquiry was addressed by Yaḥyā Ibn ʿUmar.

[101] Abū Bakr Aḥmad Ibn Muḥammad Ibn Muyassar al-Iskandarānī (d. 309/921) was an Egyptian jurist of the fourth generation, who became the chief Mālikī authority and scholar following the death of his teacher Ibn al-Mawwāz. Although he was an accomplished jurist, the local population distanced themselves from him or even disliked him when the governor of Qayrawān, who invaded Alexandria in 307/919, appointed him as a governor until the ʿAbbāsīds recaptured the city. The ʿAbbāsīd's appointed governor of Egypt removed him from office, detained him, and later released him. Shīrāzī, *Ṭabaqāt al-Fuqahā'*, 154; Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 5:52–53; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 1:169; Suyūṭī, *Ḥusn al-Muḥāḍara*, 1:191; Makhlūf, *Shajarat al-Nūr*, 80.

[102] This response seems similar to Digest IV, 9, 6. *Paulus, on the Edict, Book XXII*: "Although you may be transported in a ship without charge, or be entertained gratuitously in an inn, still, an action *in factum* will not be refused you if your property is unlawfully damaged." See Scott, *Civil Law*, 3:137.

Although the goods are subject to contribution, in our view, however, there should be no contribution for gold (cash).[103]

Abū Marwān[104] states: I[105] asked the *qāḍī* Ibn Abī Maṭar[106] about the judicial status of gold (cash). Response: No contribution is required for gold.[107] He also told me that Muḥammad Ibn ʿAbd al-Ḥakam affirms this ruling. However, ʿAbd al-Malik Ibn Ḥabīb holds: The owner of the gold must pay contribution, if it is intended for commercial purposes, rather than for the performance of his pilgrimage (*Ḥajj*) and personal or family expenses.[108]

Ibn Ḥabīb recounts: I heard Aṣbagh recounting a ruling attributed to Ibn al-Qāsim concerning a group of people, who, when the wind blew vehemently, were forced to jettison part of the cargo to lighten the ship and save themselves. The judicial decision in this case, according to Mālik, was to distribute the value of the jettisoned goods among the remaining safe goods. The owners of the jettisoned cargo become proportional shareholders in the remaining unspoiled goods; it is as if the goods that were lost and the goods that were spared belonged to all of them. Their joint ownership comprises both the merchandise that is gone and that which remains, and their shares are based on the value of their own goods. If they purchased their goods from the same place and town [48*v*.] at acute prices, they become shareholders at these prices as long as every merchant presents solid evidence substantiating the actual price of the jettisoned cargo, and the others do not challenge him or prove that he is lying.[109] However, if they did not purchase the goods from the same town, or there were those who purchased their goods on the day of sailing and those who purchased theirs much earlier, (33) and

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[103] Ṭaḥāwī, *Mukhtaṣar Ikhtilāf al-ʿUlamāʾ*, 3:404; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 237; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 230; Qarāfī, *Al-Dhakhīra*, 5:487; Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:642–643; Wansharīsī, *Al-Miʿyār*, 8:311.

[104] Abū Marwān ʿAbd al-Malik Ibn Ḥabīb Ibn Sulaymān Ibn Ḥārūn al-Salamī al-Elvīrī al-Qurṭubī (174–238/790–853) is of the third generation and the author of *al-Wāḍiḥa*. Ḥajjī, *Aʿlām al-Maghrib*, 1:199.

[105] This inquiry was addressed by Muḥammad Ibn ʿUmar to the judge Abū al-Ḥasan ʿAlī Ibn ʿAbd Allāh Ibn Abī Maṭar.

[106] Abū al-Ḥasan ʿAlī Ibn ʿAbd Allāh Ibn ʿAbd al-Raḥmān Ibn Abī Maṭar al-Muʿāfirī (d. 337/948) is an Alexandrian jurist and judge of the fourth generation—the Egyptian branch. Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 5:281–282; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 2:123.

[107] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 237.

[108] Ibn Rushd, *Masāʾil*, 2:1051; Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:643.

[109] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 239.

the market had changed, either up or down, then they become shareholders at the current value of the goods on the day of boarding at the embarkation port, after appraising the remainder and the jetsam. Their joint ownership is of the unspoiled merchandise—regardless of whether the person threw overboard his own or someone else's cargo, and whether they were or were not consulted—as long as the aim of the jettison was to save lives and lighten the ship.[110] Furthermore, whoever carried a large sum of private *dīnār*s and *dirham*s for commercial transactions must include them in the joint ownership for they stand in the place of commodities. By contrast, currency that is intended for travel expenses, performance of the pilgrimage, or the like, is not subject to contribution.[111] Moreover, all humans, be they freemen or white slaves (*mamālīk*), acquired for personal purposes, are excluded [from the calculation] with the exception of merchants' slaves, whose value is calculated in the same way as the value of commodities. Neither the ship owner, nor the vessel's crew, be they freemen or white slaves, nor those who travel without cargo, are subject to contribution.[112] Ibn al-Qāsim said: This order reflects the subjective personal opinion of Mālik and his doctrine. ʿAbd al-Malik [Ibn Ḥabīb] argues: This is what our Medīna and Egyptian jurists call for. Ibn Abī Ḥāzim,[113] Ibn Kināna,[114] Ibn Wahb,[115] and others do not, to my knowledge, hold a different opinion. I heard only Ibn al-Mājishūn[116] expressly saying: Whatever cargo

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[110] Ibn al-Jallāb, *al-Tafrīʿ*, 2:295; Ibn Rushd, *Fatāwā*, 2:1191–1193; *idem*, *Masāʾil*, 2:1051–1052; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 235, 238; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 229; Qarāfī, *Al-Dhakhīra*, 5:490; Wansharīsī, *Al-Miʿyār*, 8:298–299, 311–312; Ibn Juzayy, *Al-Qawānīn al-Fiqhiyya*, 337; Shāfiʿī, *Al-Umm*, 6:86, 171; Sughdī, *Al-Nutaf*, 2:791–792, 902; Ibn Qudāma, *Al-Mughnī*, 12:550–551; Awzajandī, *Fatāwā Kāzī-Khān*, 3:53.

[111] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 236; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:527.

[112] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:113; Qarāfī, *Al-Furūq*, 4:10; *idem*, *Al-Dhakhīra*, 5:487.

[113] ʿAbd al-ʿAzīz Ibn Abī Ḥāzim Ibn Salama Ibn Dīnār, is of the first generation, died in Medīna after 182/798. Ṭāher (ed.), *Akriyat al-Sufun*, 33.

[114] ʿUthmān Ibn ʿĪsā.

[115] Abū Muḥammad ʿAbd Allāh Ibn Wahab Ibn Muslim al-Qurashī (125–197/743–813). Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 3:228–243; Kindī, *Al-Wulā wal-Quḍā*, 410–418; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 1:413–417; Ibn Khallikān, *Wafiyyāt al-Aʿyān*, 1:240–242; ʿAsaqalānī, *Tahdhīb al-Tahdhīb*, 6:71–74; Makhlūf, *Shajarat al-Nūr*, 58–59; Zirkilī, *Al-Aʿlām*, 4:289.

[116] Abū Marwān ʿAbd al-Malik Ibn ʿAbd al-ʿAzīz Ibn ʿAbd Allāh Ibn Abī Salama al-Mājishūn (d. 212/827) is of Persian origin and a disciple of Mālik. Kindī, *Al-Wulā wal-Quḍā*, 448; Shīrāzī, *Ṭabaqāt al-Fuqahāʾ*, 148; Qāḍī ʿIyāḍ, *Tartīb al-Madārik*,

has been jettisoned due to the fear of sinking is to be shared proportionately by the shippers.[117] But, if the foodstuffs and cargo were ruined, the actual owner is solely liable, if his foodstuffs were separated from others' by partitions. Notwithstanding, if the foodstuffs in the ship's hull were intermingled, the damage ought to be distributed proportionately among their owners.[118] I will deal extensively with this issue at the appropriate place, God willing.

From the *ʿUtbiyya*: Abū Zayd relates an account to Ibn al-Qāsim about a vessel whose passengers and seamen fear that they will founder, so they jettison some of her cargo. Response: They contribute without discrimination to their loss, based on the value of the goods at the place where they were loaded on board. If they purchased them from a particular place, that would be, in my view, the best price for their calculations. (34) Saḥnūn transmitted a ruling attributed to him (Ibn al-Qāsim): If they purchased them from one particular location, for instance, [if] all of them bought their goods from Miṣr, then the owner of the jetsam would share with his co-shippers the jettisoned and remaining unspoiled goods, based on the price of purchase. However, if they acquired their goods from different places, for instance, [if] some merchants bought from Miṣr and others from Aswān or in a suburb of Fusṭāṭ, then this matter differs from the former. They must consider the price of the jetsam and remaining safe cargo at the place where it was taken on board—for instance Qulzum (Clysma) and Jedda—and calculate [49*r*.] the price of the jetsam and remaining unspoiled cargo. In other words, if it was bought at the place from which it was shipped, they all become joint owners of the jetsam and remaining unspoiled goods. The variation of times is similar to the variance of countries. For instance, if someone were to make the purchase a year ago and the other were to purchase a month ago, the goods will be reckoned as if the former made the purchase a month ago.[119]

3:136–137; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 2:6–7; ʿAsaqalānī, *Tahdhīb al-Tahdhīb*, 6:407–408; Ibn Khallikān, *Wafiyyāt al-Aʿyān*, 2:340–341; Makhlūf, *Shajarat al-Nūr*, 56; Zirkilī, *Al-Aʿlām*, 4:305; Ḥajjī, *Aʿlām al-Maghrib*, 1:183.

[117] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 236.

[118] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 231.

[119] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:112; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:85–87; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 238; Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:655.

Mālik holds: If one of the shippers had procured foodstuff upon credit, and it was jettisoned later, then its price is to be reckoned as if he had paid in cash, without including any increase in market value since then. Justice requires that his compensation be calculated from the amount paid at the port of embarkation.[120]

Mālik holds conflicting opinions in the *Mukhtaṣar*, concerning the evaluation of the jetsam: [It could be based on the market prices] at the port of embarkation; at the intended destination; or at the place where it is jettisoned.[121] Ashhab transmits an opinion from Mālik, stating that its value should be based on [the market prices] where it was cast into the sea.[122]

Ibn Abī Zayd holds the following: However much of the shipment the crew and shippers throw into the sea, owners of the jetsam and the owners of the spared goods shall become shareholders in the jetsam and the remaining cargo. If they, all of them, purchased at one particular place at roughly the same time, then the valuation would be based on the purchase prices; they would all become joint owners in the jetsam and the remaining safe cargo based on that purchase price there. Those whose cargoes were jettisoned become joint owners with those whose goods remained at their disposal. Likewise, everyone whose cargo was not jettisoned becomes a co-owning shareholder with the owner of the jetsam in his jettisoned portion only; but those whose cargo remained aboard do not become partners with each other.[123] Whoever carried cargo that was jettisoned, but was not bought in the place from which it was shipped, or was acquired a long time ago, becomes a shareholder in its value, based on the market place at the point from which it was shipped. Furthermore, if someone carried an article known to its owner only, while the rest of the crew and shippers neither knew what it is or what is worth, and its owner claimed later that its description is thus and so, if the rest specifically refute him and claim otherwise, then their testimonies under oath are

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[120] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:113; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 238; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 229.

[121] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:113; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 229; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:655; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:557.

[122] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 238; Qarāfī, *Al-Dhakhīra*, 5:486; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:655.

[123] Qarāfī, *Al-Dhakhīra*, 5:486; *idem*, *Al-Furūq*, 4:10.

presumed to be true. However, if they are unaware [of the quality and quantity of his cargo], then the attestation of the owner, under oath, must be deemed credible.[124] He said further: If the value of the jetsam (35) is equivalent to the value of the remaining goods, the owner of the jetsam shall receive half of the remaining goods. If the amount of half of the remaining goods is equivalent to one-third of the total, then the remaining goods shall be divided into three parts [of equal value], one for him and two for them. If half of his cargo was jettisoned, while the other half remained safe, the rest of the shippers too retain half of their goods without claiming restitution; he becomes their co-owner as to the other half of [the merchandise that remained safe] proportionate to the value of his own remaining half and to the value of half of their goods, *i.e.*, he becomes a joint shareholder with them as to the remaining safe half of their goods. Likewise, if his entire shipment was jettisoned and later salvaged from the sea, but lost half its value, he shares with them half of their goods, proportionate to the value of half of his goods and half of theirs; no shipping fees are due for goods jettisoned and seriously damaged. Once the owner of the jettisoned cargo becomes a joint owner as to the cargo that remained safe, he must pay the shipping fee in proportion to the value of the reimbursement he received. If half of his shipment was salvaged intact, while the [other half is totally lost], he does not have to pay the freight for the spoiled cargo, only for his remaining undamaged portion. [49*v*.] Thus, this cargo owner must pay half of the freight, in addition to the salvor's labor and expenses incurred for salvaging the jetsam. However, [an alternative is to] consider deducting the value of the damaged cargo from the intact cargo, then reducing the shipping fees proportionate to the depreciation in its value, with the cargo valued on the basis of the market price at the port from which it was shipped.

He (Abū Muḥammad Ibn Abī Zayd) was asked about a group who chartered a ship to convey cargo from Sicily to al-Mahdiyya. They departed, but they encountered a violent gale and a tempestuous sea, which forced them to jettison part of their goods and return to Sicily disconsolate. They discovered there that the goods

[124] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:113; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:87; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:527.

that remained in the vessel were drenched and their value partially diminished. [What if] the damage done to the goods occurred prior to, as opposed to after the jettison occurred? Response: Those who jettisoned their goods become shareholders with those whose goods remained on board but suffered damage. The price for the owners of the damaged goods is calculated [as if they were] unspoiled, based on the market prices at the port from which they were shipped. Thus, their joint ownership of those [goods] is proportional to the price of the jettisoned goods. The price of the unspoiled goods should be reckoned on the basis of the market prices at the port from which they were shipped, as we have mentioned; the damage to the goods shall be considered as if it affected all shippers on board. This [rule is applied] as long as the goods were sound at the time of jettison and the damage occurred after they were cast overboard. However, if the damage befell goods prior to jettison, their value is based on their imperfect state in Sicily.[125] We have referred to this issue earlier.[126]

(36) The following was addressed to Yaḥyā Ibn ʿUmar: Consider a situation where a ship encounters a vigorous gale and part of the goods is jettisoned. Shall all the contents of the vessel be subject to general averaging? Response: Yes, everything on board the vessel, which was purchased for commercial purposes, including gold, precious stones, silver, foodstuffs, slaves, and other mercantile items, shall be averaged. However, slaves acquired for non-mercantile purposes, the vessel's crew—even if they are slaves—freeborn passengers traveling on the vessel, and the vessel herself are not subject to contribution, regardless of [the quantity of jetsam], small or large.[127] He was further asked: How shall the jetsam be assessed, [based on its value] at the place where it was jettisoned, or at the destination, or at the port of embarkation? Response: It shall be valued based on its market prices at the port of embarkation; the owner of jetsam becomes a joint owner of the jetsam and remaining safe goods.[128]

Muḥammad Ibn ʿAbd al-Ḥakam states: Our fellow jurists unanimously agree about the exclusion of a vessel from the regulations of

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[125] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 239–240; Wansharīsī, *Al-Miʿyār*, 8:299.

[126] He refers to his response on folio [44*v*.], 286–287.

[127] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:112; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 236; Shammākhī, *Īḍāḥ*, 3:609.

[128] ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:527; Qarāfī, *Al-Dhakhīra*, 5:486.

jettison. By contrast, our ʿIrāqī fellow jurists contend that the vessel, the vessel's slaves, tackle, and all on board that are acquired for commercial purposes or private possessions, all of these enter into the value of jettison.[129] [A holding attributed to] Saḥnūn is cited in the book of Ḥabīb Ibn Naṣr,[130] an associate of the court examining cases of wrongful exaction [in Qayrawān], stating that the vessel's servants are included in the calculation when computing the value of the jetsam.[131]

Abū Muḥammad Ibn Abī Zayd was asked about a vessel, which was caught in a rough sea while lying at anchor in the territorial waters of al-Mahdiyya.[132] Her bottom hit the sea floor. Because of fear of running aground or wreck [50*r*.], some of her cargo was jettisoned in order to lighten the ship and thus save her. When the storm abated and the vessel and her remaining shipments were saved, and the jettisoned goods lost, the owners of the shipments requested that the vessel be included in the valuation of what was jettisoned and what was saved, but the ship owner refused. When they sought his judgment,[133] he responded: If they were jettisoned for fear of having the lower hull cracked and running aground, then the vessel and her remaining safe goods shall be subject to a general average; its value should be determined after deducting the jetsam from the remainder.[134]

(37) Ibn Ḥabīb states: Ibn al-Qāsim holds that, if something is thrown overboard during frightening conditions at sea, then the sworn testimony of each person on board concerning the price of his jetsam, as well as his unimpaired goods, is credible, if conclusive evidence has not been introduced that proves otherwise. Saḥnūn is cited

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[129] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 236–237; Qarāfī, *Al-Dhakhīra*, 5:487; *idem*, *Al-Furūq*, 4:10; Wansharīsī, *Al-Miʿyār*, 8:298; Nuwayrī, *Al-Ilmām*, 2:244.

[130] Ḥabīb Ibn Naṣr Ibn Sahl al-Tamīmī (201–287/816–900) is an Ifrīqiyan jurist of the third generation and one of Saḥnūn's companions. Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 4:369–370; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 1:336–337.

[131] Qarāfī, *Al-Furūq*, 4:10; Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:643–644; Nuwayrī, *Al-Ilmām*, 2:244.

[132] The term "sea of al-Mahdiyya (*baḥr al-Mahdiyya*)" very likely refers to the territorial waters adjacent to the port city al-Mahdiyya. See Khalilieh, *Islamic Maritime Law*, 138–148.

[133] Abū Zayd.

[134] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 235; Ibn Qudāma, *Al-Mughnī*, 12:551; Qarāfī, *Al-Dhakhīra*, 5:487; *idem*, *Al-Furūq*, 4:10; Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:657; Wansharīsī, *Al-Miʿyār*, 8:306; Nuwayrī, *Al-Ilmām*, 2:244.

in the *ʿUtbiyya* thus: A rebuttable presumption exists that the testimony of every shipper, concerning the amount and price of his jettisoned foodstuffs, is truthful, so that neither conclusive evidence nor an oath is required if his truthfulness seems credible. However, if there are suspicions surrounding it, or the veracity of his statement is attached, then he must testify under oath.[135]

Faḍl Ibn Salama[136] was asked: Consider that shippers jettisoned part of their cargo during a frightening time on a voyage. When they reached their intended destination, some shippers claimed that such-and-such possessions of theirs were jettisoned, while the ship owner contended that "the cargo transported aboard my ship was less than what is alleged by each claimant;" other merchants confirmed his testimony. Faḍl Ibn Salama responded: My ruling on this matter is as follows: Regarding the volume of the shipment, one should scrutinize the cargo book (*shāmil*).[137] In our rules of evidence, it has become an authoritative document (*zahīr*), to which the people constantly refer. However, for any [claim raised by a shipper concerning] items not registered in the cargo book, there is a rebuttable presumption that the owner's statement is true if based on sworn testimony, provided that he presents evidence supporting his claim that he owned the cargo he alleges was his.[138] Ibn Abī Zayd holds

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[135] Saḥnūn, *Al-Mudawwana*, 4:490–491; Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 239; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:87; Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:644.

[136] Faḍl Ibn Salama Ibn Jarīr Ibn Mankhūl al-Juhanī al-Bajjānī (d. 319/931). Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 2:221–223; Shīrāzī, *Ṭabaqāt al-Fuqahāʾ*, 164; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 2:137–138; Makhlūf, *Shajarat al-Nūr*, 82.

[137] Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:644; Qarāfī, *Al-Dhakhīra*, 5:487. Saḥnūn declared: "His testimony is acceptable and he is not obligated to swear so long as he has not been suspected. If he claims that a large quantity of his goods was cast overboard, while the captain, on the other hand, disputes that, he (*qāḍī*) should scrutinize in the cargo book (*al-sharmal*), which is a registry of the cargoes on board; his testimony, on oath, is approved for the quantity of cargo written in the cargo book (*al-sharmal*)"; Wansharīsī, *Al-Miʿyār*, 9:115–116; Idris, *Berbérie orientale*, 2:281. The Cairo Geniza letters of the eleventh century and the Andalusian jurist Al-Jazīrī call this cargo book *al-sharanbal*. See Gil, *In the Kingdom of Ishmael*, 2:634 [217], TS Arabic 18 (1).101, l. 12 (*al-sharanbal*); 4:21 [614], ENA NS 18, f. 35*v*., l. 22; 4:436 [745], INA D 55, f. 14*v*., l. 20. With reference to the ship's scribe, *ibid*., 4:149 [647], Gottheil and Worrell, 36, l. 24 (*kātib mawrida*, literal translation is "registrar of cargo"). Jazīrī, *Al-Maqṣad al-Maḥmūd*, 229. The Arab geographer al-Muqaddasī observed that cargo books (*dafātir*, log books) were used by Arab ship owners and captains in the Indian Ocean during the tenth century. See Muqaddasī, *Aḥsan al-Taqāsīm*, 10.

[138] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 239; Burzulı, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:644.

that, if the merchants who accompany him on board are unfamiliar with the amount or type of his part of the cargo, then a there is a rebuttable presumption will exist that his sworn testimony is true. However, if they repudiate his claim and testify otherwise, their testimony under oath will be deemed true.[139]

Ibn Abī Zayd holds: If the cargo of some person was jettisoned after his fellow shippers paid him and delivered a quantity of *dīnār*s in advance for retaining their own goods, then their agreement may still be lawful, if they jointly acknowledge the penalty for breaching the settlement of accounts and agree to accept the discrepancy by mutual agreement.[140] He was further asked: What if the cargo of a shipper was jettisoned and, after his fellow shippers compensated him for it, the cargo was salvaged and was unspoiled or, alternatively, half of its value was destroyed? Response: If the cargo was salvaged in its original condition, then it remains his, the agreement for his compensation is annulled, and their joint ownership of the cargo by all the shippers reverts to its original status. Alternatively, if it was salvaged and half of its value was lost, then half of the [financial] settlement is abrogated; he refunds them half of his compensation, retains the salvaged [cargo], and pays the shipping charges in accordance with the procedure set forth earlier. However, if he refuses to take the unspoiled salvaged jetsam back, on the pretext of a joint partnership (38) of it between them regarding the jetsam and their goods, or [on the pretext of] concluding a sale transaction with them in exchange [for saving their goods], then he is being deceitful.[141] Were he to evoke Ibn al-Qāsim's ruling, concerning a beast of burden, whose borrower or lessee strays from a direct passage to his destination, it gets lost, and its owner subsequently sets with the lessee for its value. However, in such a case, if the beast of burden is found, its owner does not have to take it back, and it belongs [50*v*.] to the transgressor (lessee). The two instances are not analogous, for the case of the beast of burden involves transgression, which necessitates a liability. However, with reference to occurrences that take place at sea, the shipper has not exceeded his authority rather

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[139] Wansharīsī, *Al-Miʿyār*, 8:299.

[140] Ṭaḥāwī, *Mukhtaṣar Ikhtilāf al-ʿUlamā'*, 3:404; Wansharīsī, *ʿUddat al-Burūq*, 630; Shammākhī, *Īḍāḥ*, 3:609–610.

[141] *Iḥtāl*, the root is *ḥ.ī.l.* legal device—practicing an artful contrivance or device against somebody to escape his obligation to him.

circumstances have compelled him to [jettison cargo]. Thus, whatever cargo is saved shall be delivered to its actual owner, except if it is damaged, in which case the loss shall be deducted from the total value of unspoiled remaining goods on board. If his goods are salvaged, but the sea has destroyed half of its value, it should be treated accordingly, that is, as if half of his cargo remained in its original condition (safe), whereas the other half was lost. In this case, the unlucky shipper is not entitled to claim joint ownership of the goods that remained safe, and therefore, may share with other shippers half of their cargo, nor may he share in the other half in proportion to the value of his own lost cargo. He must, then, have the cargo salvaged and forgo any distribution for the portion that is spoiled, accepting it as only his property. May God lead us down a just path.[142]

VI. *On the Liability or otherwise of Ship Owners for what They Carry*

Since people also have to hire the untrustworthy among the lessors to transport [their cargo], jurists have deemed it appropriate and viewed it as more just to hold them responsible only for conveying staple foodstuffs (*aqwāt*, lit. nutriments), that is, edible grains [*maʿāyish*] and seasoning (*idām*); although, they are held liable for the transport of goods other than such basic foodstuffs, if it is undertaken at inappropriate times.[143] Generally speaking, however, lessors are relieved from liability [for loss or damage to cargo]. In the same way, jurists have deemed it appropriate [not] to hold hired craftsmen liable for the materials they used in their products,[144] because people have no alternative but to hire them, since they cannot dispense with in their skills.[145]

ʿAbd al-Malik Ibn Ḥabīb holds: Whatever ship owners convey aboard their ships, they are held accountable for the staple foodstuffs

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[142] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 239–240; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 229; Qarāfī, *Al-Furūq*, 4:10–11; Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:644–645.

[143] Saḥnūn, *Al-Mudawwana*, 4:490–491; Wansharīsī, *Al-Miʿyār*, 8:334.

[144] Another way of translating this unclear statement is: "They (ship owners) are responsible for shipwrights or other craftsmen (*ṣunnāʿ*) whom they hire from the dockyards (?)" Readers should note that Ṭāher's edition lacks key statements in this particular paragraph, statements he fails to insert to the main text.

[145] Ḥaṭṭāb, *Mawāhib al-Ǧalīl*, 7:497.

and seasonings. But they are not liable for other shipments delivered to them unaccompanied by their owners. If the owners accompany their shipments, the ship owners would be exempt from any potential liability for the cargo and the foodstuffs would fall into the same category as other commercial commodities; the [ship owners] would, thus, not be held accountable, if it is established that spoliation or other damage to the cargo resulted from the wreck or sinking of the ship, or from acts of nature, which are often the punishments by God.[146] The ship owner can be held liable, however, for damage or ruin (to the cargo) caused by his obvious misconduct or wrongful act.[147] (39) Commodities delivered to ship owners, which subsequently become unsound, are not guaranteed by them, and their testimony, in case of serious damage or total loss, is presumed to be true. However, [as regards] all staple foodstuffs essential to the lives and livelihood of people not known specifically to the lessors, their carriers are liable for [their safe delivery]; their testimony, in case of total loss, is unacceptable, unless they present conclusive evidence substantiating their claims that the damage was not due to a wrongful act or negligence on their part.[148] Furthermore, if the transported oils or other foodstuffs are guaranteed, and the [ship owner] claims that they were spoiled *en route*, then he is liable for the damage; he is not obligated to refund [the shipper] on the basis of the market price at the place where the damage occurred—whether that town is known or unknown, if the damage resulted from his own mis-

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[146] Shāfiʿī, *Al-Umm*, 6:171; Saḥnūn, *Al-Mudawwana*, 4:493–494; Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ẓiyādāt*, 7:106; Māwardī, *Al-Ḥāwī al-Kabīr*, 17:428; Ibn Juzayy, *Al-Qawānīn al-Fiqhiyya*, 341; Sarakhsī, *Al-Mabsūṭ*, 16:10; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 230; Qarāfī, *Al-Dhakhīra*, 5:526, 527, 529; *idem*, *Al-Furūq*, 4:13–14; Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 8:31–32; Wansharīsī, *Al-Miʿyār*, 8:333–334; Muḥaqqiq al-Thānī, *Jāmiʿ al-Maqāṣid*, 7:298; Shaʿbī, *Al-Aḥkām*, 302, points out that if the shipper sails aboard another vessel in convoy he would be held liable for the damage of his cargo.

[147] Shāfiʿī, *Al-Umm*, 6:171; 7:140; Saḥnūn, *Al-Mudawwana*, 4:494–496; Ṭaḥāwī, *Mukhtaṣar Ikhtilāf al-ʿUlamāʾ*, 4:88–89; Ibn al-Mundhir al-Nīsabūrī, *Al-Ishrāf*, 1:236–237; Ibn al-Jallāb, *Al-Tafrīʿ*, 2:188; Qudūrī, *Mukhtaṣar al-Qudūrī*, 116; Māwardī, *Al-Ḥāwī al-Kabīr*, 7:428; Sarakhsī, *Al-Mabsūṭ*, 15:80–81; 16:10; Kindī, *Al-Muṣannaf*, 21:155; Ṭūsī, *Al-Nihāya*, 447–449; Awzajandī, *Fatāwā Kāzī-Khān*, 2:312; Nawawī, *Al-Majmūʿ*, 14:119, 124–125; Shammākhī, *Īḍāḥ*, 3:608–609; Ibn ʿAskar, *Ashal al-Madārik*, 2:333; Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 8:31–32; Manlā-Maskīn, *Kanz al-Daqāʾiq*, 2:157; Majlisī, *Milādh al-Akhyār*, 11:413–414.

[148] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ẓiyādāt*, 7:105; Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, 2:333–334; Wansharīsī, *Al-Miʿyār*, 8:333–334.

conduct or risk-taking—but he is liable for all of the damaged cargo based on the market prices at the farthest town for which he is heading, provided that the [lessee] pays all the shipping fees.[149] Mālik holds [51*r*.] that if the ship owner sells the foodstuffs somewhere *en route*, its owner is entitled to receive an equitable price for them, if he so desires, but not their actual value at the port of origin. If he does not accept the price, he is entitled to have the same quality and quantity [of foodstuffs] at the destination. If he does accept the first price, he has the right to require him (the ship owner) to convey a comparable consignment from the town where the shipment was sold to the destination stipulated in the charter, on condition that he pays the entire freight.[150]

ʿAbd al-Malik holds: They are not liable for all that to which the category of food, such as fruits and other edibles, applies. But they are held liable for [the loss of] staple foodstuffs that people need for nourishment and survival. Therefore, they commission those who are trustworthy among the lessors to convey essential foodstuffs for that purpose.[151] Thus, lessors are not answerable for all foodstuffs that do not fall into this category; they are absolved from liability with regard to other foodstuffs since they are ranked as commodities. Of the foods derived from seeds, they are liable for all nutritious [grain] and staple foodstuffs needed for the nourishment [of humans] and their livestock, particularly wheat, barley, flour, common barley (*sult*), wheat having two grains in one husk (*ʿuls*), corn, millet, and lentils; (40) rice, however, is excluded because it is a luxury. Of the legumes, they are liable for fava beans, lentils, chickpeas, cowpeas, and chicklings (pois chiche); lupine is not guaranteed since it is dispensable, in spite of its inclusion among the dried legumes for purposes of almsgiving (*zakāt*). He further adds: for other items they are not liable, except four: oil and cooking fat, along with honey and vinegar. If someone were to say that honey is dispens-

[149] ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:527: "Had the ship owner claimed losing the foodstuffs, they would have to compensate [the merchants] based on their prices at the place where they were loaded." Some scholars approve so long as shippers accompanied their goods. Asbagh ruled: "If the shippers accompanied their consignment, the ship owner would be absolved of liability."

[150] Ibn Abī Zayd Qayrawānı, *Al-Nawādir wal-Ẓiyādāt*, 7:106–107; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:135–136; Qarāfī, *Al-Dhakhīra*, 5:529–530.

[151] Wansharīsī, *Al-Miʿyār*, 8:335.

able and not essential to some people, [I] would answer this as follows: Those well-endowed with God's bounty do not dispense with it, and God has created it to be used as a source of food, drink, and medicine;[152] even if these indicate affluence, they are entitled to receive just and equal consideration. As for marmalades, concentrated juice, licit drinks, and that which is used for seasoning cheese, dried yogurt, rape, yogurt, butter, dried curd, and cottage cheese (*aqiṭ*),[153] the carrier is not liable for these at all, and there is a presumption that his testimony, in case of total loss, is presumed to be true on the grounds that they, like other commodities, are luxuries but not basic foodstuffs.[154]

ʿAbd al-Malik holds: No liability attaches for damage to or loss of fruits from trees, dried or not, except for dates, raisins and olives, which are essentially staple foods, while the other fruits from trees are not guaranteed by the law, since they are eaten for pleasure. All others, such as walnuts, hazelnuts, pine nuts, and other dried and fresh fruits are not guaranteed, since they are accessories to food, but not associated with the essential staples. Likewise, carriers are not held liable for dried meats, fish, pepper, vegetables, seeds, and eggs.[155] However, they are liable for salt since it is indispensable and no food is tasty without it.[156]

(41) ʿAbd al-Malik holds: Carriers are held liable for any fats, apart from the basic commodities, including seeds, all kinds of merchandise, fragile items and livestock, whether transported by land or by sea; their testimony, in case of total loss, is presumed to be true.

Mālik is quoted in Ibn al-Mawwāz's book as stating: If the ship owners stipulate in the shipping contract that they are not to be

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[152] *Qurʾān* 14:68–69: "And thy Lord taught the Bee to build its cells in hills, on trees, and in (human) habitations. Then to eat of all the produce (of the earth), and find with skill the spacious paths of its Lord: there issues from within their bodies a drink of varying colours, wherein is healing for men: verily in this is a Sign for those who give thought."

[153] A preparation of dried curd made from churned, skimmed sheep's or goat's milk, cooked and then left until it hardens; or made from camel's or other milk which is dried, and becomes very hard, used for cooking; or a cheese-like milk product.

[154] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:106; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 230; Qarāfī, *Al-Dhakhīra*, 5:529; Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, 2:333.

[155] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 230; Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, 2:333.

[156] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 230.

held liable for the foodstuffs, but for that which is not subject to liability, then their stipulation [51*v*.] is invalid and the contract is void. If they include such a condition, they assume liability for foodstuffs only, and they can be paid fully for the freight, regardless of the contract terms.[157]

Mālik holds: If the oil leaked from its skin bags and the ship owner claimed that it seeped [out], experts in these matters should be consulted. If the level of shortfall is equivalent to [the normal amount of leakage], the ship owner is relieved of liability after he takes an oath. Mālik further rules: Had the foodstuff been conveyed in a vessel and spoiled, the lessor would be liable, if he was negligent. As for the portion that is unspoiled but still wet, let him dry it out and transport it—the ship owner is to testify under oath that this cargo was saved that way. Muḥammad [Ibn al-Mawwāz] holds: This ruling pertains to a situation where the shipper of foodstuffs does not accompany his consignment, for the ship owner might be charged with stealing part of it or immersing the remainder in the water. If it were drenched, increasing its weight, there is nothing wrong, if he suspects something and requests that he testify under oath; however, he would not be liable as he would be where the goods were damaged by wetting.[158]

Yaḥyā Ibn ʿUmar holds: If part of the goods and foodstuffs in the ship got drenched and its value depreciated, that value has to be determined by comparing its original price with its price after it was drenched. If it lost half of its value, the shipping charges should be reduced by half, or less or more according to the loss. Yaḥyā said further that Abū Zayd also cited an identical judgment attributed to Ibn al-Qāsim and Aṣbagh in the *Thumāniyya* of Abū Zayd. Abū Muḥammad Ibn Abī Zayd holds: I observed a very well known edict ascribed to some of our fellow jurists concerning a shipper, who chartered a ship and delivered loads of cargo to a ship owner for transport. The ship owner failed to arrive at the destination on time, and a portion of the goods got wet and depreciated in value. Response: The wet cargo should have been appraised for their value when they were unspoiled and after they got wet. If they lost a third

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[157] Saḥnūn, *Al-Mudawwana*, 4:491; Qarāfī, *Al-Dhakhīra*, 5:529.

[158] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ẓiyādāt*, 7:107–108; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 230–231; Awzajandī, *Fatāwā Kāzī-Khān*, 3:312; Qarāfī, *Al-Dhakhīra*, 5:486.

or a quarter of their value, the shipping charges are to be deducted by a third or a quarter.[159]

From the *ʿUtbiyya*: Mālik ruled concerning a lessor who signs a contract [with a lessee] to convey on his vessel a hundred *irdabbs*[160] [of wheat] on condition that ninety-seven *irdabbs* be safely delivered in al-Qulzum, *i.e.*, deducting three *irdabbs* for possible diminution *en route*. Response: There is no harm in that.[161]

Mālik ruled concerning someone who hired a man and gave him money with which to buy foodstuffs and convey them. [What if] the man purchased foodstuffs and thereupon claimed that they were lost or stolen? [Response]: If he transported them aboard a ship, he himself is held accountable; otherwise, if he conveyed them by other means at the direction of their owner, then his statement is more credible.

(42) Ibn al-Qāsim ruled in the case of a shipper who hired a ship owner to transport wheat and paid him in gold. The wheat subsequently diminished in quantity, and its owner sought a refund, to be paid in gold, for the amount that was diminished. [Response]: He is not entitled to payment in gold, unless he paid the ship owner in cash. But, if he paid the freight charges in cash, he can also seek compensation in wheat or barley, if the consignment consisted of barley.[162]

Ibn Ḥabīb holds: Hiring seamen to operate a ship, transport people aboard her, and lease her to [a third party] is lawful. But, they (seamen) are not liable for damage that may affect the conveyed foodstuffs. Mālik also maintains a similar holding.[163]

Ibn Ḥabīb holds: If the ship sank in the deepest water and all her contents were lost, and [the contract] stipulated the use of a particular [ship], then no liability attaches to the lessor, but no freight

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[159] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:111, 112.

[160] *Irdabb* is originally a Persian dry measure of capacity used in Egypt under the Ptolemies and the Byzantines, equal to 72.3 kg. of wheat. In the Mamlūk period, the *irdabb* of Cairo corresponded to 68.8 kg. of wheat, whereas the *irdabb* of Alexandria was twice as much.

[161] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:107; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:132–133. This dimunition is termed *inherent vice* of the cargo. In the course of the voyage goods may shrink or warp, or a disease may affect them especially if the shipment contains foodstuffs.

[162] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:108–109; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:58; Qarāfi, *Al-Dhakhīra*, 5:526.

[163] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:108.

is payable to him; he must refund [the lessee if the shipping charges] were paid in advance.[164]

In a passage from the *Mawwāziyya*: Aṣbagh holds: He who hires [a ship] to transport foodstuffs and accompanies them, or sends an agent to escort them [52*r*.], and later finds that some of the foodstuffs have disappeared, cannot hold the carrier liable for the loss.[165] Muḥammad [Ibn al-Mawwāz] further explains: This is because the charter-party did not originally provide that the consignment should be delivered to the carrier. Some of our fellow jurists have commented on a case where someone charters a ship for Sfax, but the wind drives her towards Sūsa. The owner of the foodstuffs wishes to proceed by land, whereas the ship owner refuses, unless he accompanies him for fear that some of the foodstuffs would be lost and he would be held liable for them. [Response]: The ship owner has no right to deter the owner of the foodstuffs, who can proceed by land if he chooses. When a shipper delivers his cargo to the ship owner for transport and gives him total custody of them when he sails away, the shipper cannot be held harmless for their loss. Rather, this merchant becomes liable [for his cargo] at the moment he is informed. But, a ship owner who does not receive the foodstuff, because its owner does not deliver it or otherwise entrust the ship owner with it, cannot be liable for its loss.[166]

Abū Saʿīd Ibn Akhī Hishām was asked: Consider a case where you charter a ship to convey cargo, commodities, or foodstuffs, but the people [crew] allows the goods that are stowed in the hull to decay and rot, results in the goods becoming worthless. And, what if the sea waves damage the upper portion [of the cargo], or the ship owner otherwise exposes them to get wet, can he be held liable? Response: Whenever cargo is damaged by the (43) sea either splashing over the topside of the ship or leaking into her hull, to the point where it becomes worthless, the contract has been breached, and the shipper is not bound to pay the freight.[167] If the goods have altered so that their value has manifestly decreased, the freight must be reduced in proportion to the depreciation in the value of them.

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[164] *Ibid*., 7:107. A similar *dictum* is established in Digest IV, 9, 3, 3. See Scott, *op. cit*., 3:136–137.

[165] Wansharīsī, *Al-Miʿyār*, 8:322.

[166] Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:645.

[167] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 229.

The spoiled [wetted] portion of the foodstuffs, dry goods (cloth), and other merchandise, stowed either in the holds or on deck must be inspected. If the spoliation occurred because of seawater spray, which often happens, without any fault or fraud on the part of the ship owner, then he is not liable for the damage and does not have to contribute from the freight on account of the cargo becoming worthless because of its dampness.[168] However, if the deterioration resulted not from the splashing of seawater, but rather has manifestly proved, beyond a scintilla of doubt, to have sustained damage through [faulty] caulking, repair at sea, or the like, the ship owner is liable for contribute for any damage.[169] Notwithstanding, if the cargo is exposed to spray that results in dampness or moisture, that does not cause severe damage, the ship owner does not have to reduce the freight charges, nor can he be held liable for the damage.[170]

He (Abū Saʿīd Ibn Akhī Hishām) was asked about a group of people who chartered a ship to transport their cargo, while they themselves sailed on board another. After embarking on the voyage, the ship owner alleged that turbulent seas overwhelmed them and forced them to jettison part of the cargo. [Note], he is not legally required to present conclusive evidence in support of his claim, unless his testimony is challenged. But what if he transports foodstuffs? Response: According to Ibn al-Qāsim, the lessor's testimony is presumed to be true if the shipment consists of commodities.[171] Ashhab, however, would find his testimony lacked credibility, if he does not present conclusive corroborative evidence.[172] Concerning the foodstuffs, both jurists would find his testimony insufficient in the absence of circumstantial evidence.[173]

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[168] ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:526.

[169] Comparable principles are instituted in Digest XIV, 2, 4, 2. See Scott, *op. cit.*, 4:210.

[170] ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:528; Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:657; Wansharīsī, *Al-Miʿyār*, 8:308–309; Ḥaṭṭāb, *Mawāhib al-Ǧalīl*, 7:556–557.

[171] Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:644; Wansharīsī, *Al-Miʿyār*, 8:299.

[172] ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:528.

[173] Wansharīsī, *Al-Miʿyār*, 8:309–310.

VII. *On Loading the Ship with Foodstuffs and/or other Goods, where One Shipper Wishes to Sell or Unload His Portion; or as the Ship Sets Sail, They Clearly Realize that She Is Overloaded and therefore Lighten Her, Delivering that Portion to some other Shipper*

Ashhab transmits an account attributed to Mālik in the *ʿUtbiyya* regarding a group of people who transport foodstuffs on a ship. Their foodstuffs get mingled and then someone wants to sell his share *en route*. Response: He is not entitled to do so except with the consent of his fellow shippers. Perhaps the lowest portion of the foodstuffs is decayed or the uppermost portion is spoiled by rain. In both situations, the unspoiled and decayed portions are to be divided proportionately among them, unless they deliberately give him his share. Afterwards they cannot sue him, if they disembark and discover that the wheat has decayed.[174]

(44) Ibn al-Qāsim relates an account ascribed to Mālik in the *ʿUtbiyya* and similarly in the *Mawwāziyya*. [What if] a group of shippers conveys foodstuffs on a ship and some shipper desires to unload his portion at the first destined port of call? [Response]: He has the right to do so. [Were] the ship to founder later, his co-shippers cannot claim restitution from him, whether they have permitted him [to unload his portion] or not. He is not required to travel with his foodstuffs to their original destinations and then sail back [to his destination]. Only if he has taken a part of their portions, they can claim restitution from him for the diminished part, but no more than that. In such a case, two witnesses must be present and never leave him out when determining the quantity [of his portion] in order to corroborate their claim regarding the diminution. Otherwise, their claim concerning the diminution is rebuttable after the first party testifies under oath that he has not taken more than he deserves, thus vindicating himself.[175]

Ibn ʿAbd al-Ḥakam holds: Consider a case where a group of people chartered a ship to convey their foodstuffs. At the first port of call, one of them unloaded his foodstuffs with permission of his fel-

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[174] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 231.

[175] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:106, 113, 347; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:77–78; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 231; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:596.

low shippers. [What if] the ship sank thereafter or part of her cargo was spoiled? [Response]: The first party has no obligation to his fellow as a result of the sinking of the ship. However, he may be held liable to his fellow shippers for the reduction in the weight. Moreover, no one who arrives at his port of debarkation has to travel with his foodstuffs beyond it or to continue the voyage with his foodstuffs to the final destination of the last shipper.[176]

From the book of Ibn al-Mawwāz, Mālik holds: Consider a case where a person was carrying on a ship fifty *irdabbs* of wheat belonging to someone else. Thereafter, he passed by another village and loaded an additional hundred *irdabbs* of wheat, which were poured on top of the wheat of the former. [Response: If] the wheat in the lower hull gets drenched, but the moisture has not reached the uppermost portion, the loss shall then be divided between both of them. They become co-owners of the lower and the upper portions, for they transported [their wheat] as if they were partners.[177] Similarly, in the *ʿUtbiyya*, Abī Zayd attributed an account to Mālik, in which he ruled on damage to a part of [a shipment of] foodstuffs, while the rest remained unspoiled. [Response]: If each shipment is placed separately and divided by partitions, then the shipper whose share gets partial dampness or decay becomes liable [and cannot recover] his own loss, while the [one] whose shipment stays dry [unspoiled] is entitled to keep it without making contribution. But if the wheat infiltrates through the barriers and mixes together, the two become joint owners of the decayed and intact portions.[178]

Some of our fellow jurists issued a ruling concerning a person who transports a load on a vessel carrying loads belonging to others. That person, but not the others, intends to discharge his own load. [Response]: He is at liberty to discharge it. No one has a right to prevent him unless [the unloading] harms other shippers, or his load is placed beneath theirs, so that by discharging it he will certainly

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[176] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:347; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:526.

[177] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:113–114, 347; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:85.

[178] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:113; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 231; Qarāfī, *Al-Dhakhīra*, 5:490; Wansharīsī, *Al-Miʿyār*, 8:301; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:596–597. Identical *dicta* are found in Digest XIX, 2, 31. See Scott, *op. cit.*, 5:91–92.

inflict harm on theirs. In that case, he shall be legally prevented from doing so.[179]

Abū Saʿīd Ibn Akhī Hishām, Abū Muḥammad Ibn Abī Zayd, and Abū Muḥammad Ibn al-Tabbān were asked about a group of people who transported foodstuffs on a ship, each one of whom [53*r*.] (45) had a fixed quota. As they were about to sail they realized that the vessel was loaded beyond her actual capacity. As a result, they unloaded one *kayl*, which was delivered to one of the shippers on the condition that [that *kayl*] be deducted from his own share; [the unloading took place] with the permission of the ship owner and those owners of foodstuffs who were present—others, however being absent. The vessel departed and part of the cargo was ruined *en route*. Those absentees wanted to claim a pro rata share from the shipper who accepted the unloaded cargo. The jurists hold: The case is decided in favor of the absentees. The recipient must deliver an equitable proportion [to the absentees], if the former has eaten or consumed it rather than selling it. But, if he has sold it, the [absentees] will have the choice of endorsing the sale and receiving [their share of] the price, or taking an equitable *kayl* of the same quantity and quality.[180]

VIII. *A Ship Owned by Two Partners: One Intends to Convey his Own Load in his Space, while the other has no Cargo; or One Repairs the Ship without Consulting his Partner*

From the *ʿUtbiyya*: Saḥnūn states his opinion concerning two men who own a ship. One intends to ship his own cargo on her, while his partner has nothing to ship. He who has nothing to ship refuses to allow his partner to sail, unless the former pays the freight. [The shipper] replies: "I am shipping [it] on my own share/space." Response: [The shipper] is entitled to ship his own shipment in his part of the vessel, and neither is obligated to pay any kind of the freight charges to his associate. Equally, the second partner can carry

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[179] Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 9:77–78; Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:656; Ḥaṭṭāb, *Mawāhib al-Ǧalīl*, 7:597–598; Kindī, *Al-Muṣannaf*, 21:153; Shiqṣī, *Manhaj al-Ṭālibīn*, 12:295.

[180] Qarāfī, *Al-Dhakhīra*, 5:491; Burzulī, *Ǧāmiʿ Masāʾil al-Aḥkām*, 3:657; Wansharīsī, *Al-Miʿyār*, 8:307.

a shipment and cargo equivalent to that conveyed by his associate. Otherwise, they must sell vessel.[181]

Abū Muḥammad Ibn Abī Zayd ruled concerning a vessel, owned by two partners, whose bottom was damaged to the degree that she became useless and nonfunctional unless repaired. The first partner, who executed the repairs without consulting his associate, billed his associate for the expenses, a sum which exceeded the actual value of the vessel. The associate said to his partner: "I will not reimburse you for what you have spent on repair, because you did so without my permission." Response: The second partner has the option of either compensating him for half of the cost of repair, fairly assessed, in which case the vessel remains in the ownership of both of them, or, if he refuses, he would be legally required to "accept half the value of the nonfunctional vessel." If the latter again refuses both settlements, or seeks half the value of the damaged vessel, but the former opposes this arrangement, then the one who fixed her would be entitled to a share proportionate to the amount spent on the restoration. (46) For example, if the value of the damaged vessel is one hundred *dīnār*s, while her value turns out to be two hundred *dīnār*s after repairs, then the one who has done the repairs would be entitled to three quarters, while [his] associate retains the remaining quarter.[182]

IX. *On Profit-Sharing between a Ship Owner and a Person who Operates his Ship; or, He [who] Delivers a Ship along with a Sum of Dīnārs to the Operator in Lieu of Part of the Profit; or a Man Entrusts with Him a Sum of Money with which to Buy Goods and Carry Them on His Ship in Consideration of a Rental Payment and a Portion of the Profit*

In the *Mudawwana*, Ibn al-Qāsim holds: If you deliver a pack animal or a ship to an employee on hire of equal shares of the freight, this is unlawful. Under these facts you must collect the whole freight

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[181] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:346; Ibn Rushd, *Fatāwā*, 1:836; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 231; Qarāfī, *Al-Dhakhīra*, 5:491; 8:72; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:646, 655; Wansharīsī, *Al-Miʿyār*, 8:308; 9:117; 10:418; Udovitch, *Partnership and Profit*, 22–23.

[182] Jazīrī, *Al-Maqṣad al-Maḥmūd*, 231–232; Qarāfī, *Al-Dhakhīra*, 5:491; ʿAbd al-Rafīʿ, *Muʿīn al-Ḥukkām*, 2:528; Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:657–658; Wansharīsī, *Al-Miʿyār*, 8:312–313.

and pay the employee an equitable wage.[183] It is also illegal if you deliver to him a pack animal or a ship to work on with the intention of sharing profits equally with him.[184] If he has already used [53*v*.] the pack animal or the ship, it is legal to allow him to keep any profit he makes and pay an appropriate rental fee; it is as though he made an invalid lease and hired himself out in an illegal manner, then the two parties have separated.[185]

Ibn Ḥabīb holds: If what could be collected by employing the pack animal or the ship is in great abundance, enabling people to procure as much as they wish, then this is licit. It is like an owner who delivers his pack animal to a [person] and tells him: "You collect and transport wood and hay using my pack animal. Whatever you collect of wood and hay is to be divided equally, half for me and half for you." If the wood and hay are in great abundance, enabling people to collect what they wish without cost, such a transaction is permissible, because he will only use the animal to transport a half load of firewood or a half load of timber. This matter is generally recognized. It is like saying: "You collect and transport firewood on my pack animal, and you get a load and I get a load." It is permissible because the quantity of the load is known. If the size of the bundles is specified, that will make more sense for me than if they are indicating unwrapped bulks since, as I explained earlier, the load or half load is known and identifiable. If they disagree about the volume of the bundles, that would call for a compromise in the assessment. But, if the quantity of wood and hay is variable, changing occasionally either up or down, and people are unable to obtain whatever they wish, then this arrangement would be unlawful. It would be like saying: "Lease or make use of the pack animal, on the condition that whatever profit you gain from the leasing (47) is to be equally divided—I receive a half and you receive a half." Since the leasing rate is unknown and changes, either up or down, and the term of the lease is indefinite, then it is illegal to [conclude such a deal]. [In order to make it legal], the bundles would have to be specified and clearly described.[186]

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[183] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ẓiyādāt*, 7:34; Māwardī, *Al-Muḍāraba*, 121; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 232; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:518.

[184] Wansharīsī, *Al-Miʿyār*, 8:224.

[185] Saḥnūn, *Al-Mudawwana*, 4:409–410.

[186] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ẓiyādāt*, 7:34–35; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:518–519.

Ibn Ḥabīb holds: The leasing of ships is similar to the leasing of pack animals, as I explained to you. Mālik holds: I do not advocate that a man lease his ship or his pack animal for a half share of her/its earnings. This is a risk-taking, since the ship owner would not know how much rent is due for the lease of his ship.[187] Aṣbagh rules that, if he were to be employed on her according to these provisions, the conveyor collects the earnings, while the ship owner procures a comparable leasing fee. However, if the owner does not deliver the ship, but retains her at his disposal, while the [employee] operates her, the profit then goes to the ship owner and the employee receives an equitable wage.[188] Ibn al-Mawwāz holds: There is no harm in delivering your ship to a man to use for one day for his own profit, provided he works on her the following day for your profit. If you say [to him]: "Use her today and the proceeds you earn are yours, but whatever you earn tomorrow will be mine," this makes more sense to me.[189]

From the *Damyāṭiyya*:[190] Ibn al-Qāsim was asked about a man who came upon a group owning a ship and asked them: Would you accept an offer of a sum of *dīnār*s to invest, on the condition that whatever profit you derive is to be divided equally, a half to me and half to you? They accepted his offer and he gave them the money. Response: They are under a delusion that they were given the money in the form of *commenda* (*qirāḍ*). He was further asked: What if he asks them to deduct the rental fee of their ship from the amount? Response: They shall receive an appropriate payment for their services along with the shipping charges, regardless of whether the money gains a profit or not.

Ashhab was asked about a person who offers a sum of *dīnār*s and a vessel to a group and tells them: "Whatever profit you make is two-thirds for me and one-third for you." Response: The contract is void if they have not yet commenced work. However, if they have,

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[187] Saḥnūn, *Al-Mudawwana*, 4:410.

[188] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:345; Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:516–519; Ibn Nujaym, *Al-Baḥr al-Rā'iq*, 5:198–199.

[189] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:36–37; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 232; Wansharīsī, *Al-Miʿyār*, 8:224–225; Ibn Sarrāj, *Fatāwā Qāḍī al-Jamāʿa*, 198–200.

[190] Its author is Abū Zayd ʿAbd al-Raḥmān Ibn Jaʿfar al-Damyāṭī (d. 226/840) is a disciple of Ibn Wahb, Ibn al-Qāsim, and Ashhab. Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 3:375; Suyūṭī, *Ḥusn al-Muḥāḍara*, 1:190; Makhlūf, *Shajarat al-Nūr*, 82.

they would be owed a comparable freight for leasing the ship, while the *dīnār*s would be equally distributed between them in the form of *qirāḍ*.[191] He was further asked about a man delivering a hundred *dīnār*s to another, along with a vessel, in the form of *qirāḍ* on condition that two-thirds of the profit be delivered to the investor, while a third was to go to the debtor. [Response]: It is inappropriate; if the *commenda* and leasing contracts are all lumped together in one deal, it will have no validity.[192]

(48) Abū Muḥammad Ibn Abī Zayd was asked about a man who delivers a sum of money in the form of *qirāḍ* to another man, who happens to be a ship owner, to purchase goods from whatever town he chooses and convey them free, aboard his vessel, with the profit shared equally between them. Response: This is an illicit *qirāḍ* [due to] the additional proviso. The [ship owner] is a wage earner [*ajīr*], who is entitled to collect an equitable wage, as well as the shipping fee for which he transports aboard his vessel; the investor alone would receive the profit or bear the loss.[193]

The author [of the treatise] Abū al-Qāsim confirms the ruling of ʿAbd al-Malik Ibn Ḥabīb, that the regulations governing the carriage of goods by ships are similar to those governing the carriage of goods by pack animals. It is like the boats entering Mālṭa[194] to convey slender wooden poles or entering Qūṣara (Pantelleria)[195] and Mulayṭima[196] to transport masts; I refer to Aṣbagh's argument as to

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[191] Wansharīsī, *Al-Miʿyār*, 8:205.

[192] *Ibid.*

[193] *Ibid.*, 8:205, 306–307; Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:466.

[194] The group of Maltese islands, including Malta (91.5 sq. km/~57.1 sq. mile), Gozo (24.75 sq. km/~15.5 sq. mile), Comine (1 sq. km./0.625 sq. mile) and some tinier ones, lies 92.8 km (58 miles) south of Sicily and about 288 km. (180 miles) southeast by east of Cape Bon in Tunisia. On the Byzantine-Islamic naval struggle over the Maltese islands consult T.S. Brown, "Byzantine Malta: A Discussion of the Sources," in *Medieval Malta: Studies of Malta before the Knights* (ed.) Anthony T. Luttrell (London: The British School at Rome, 1975), 71–87.

[195] The Arabic name is derived from the Roman Cossyra or Corcyra. It is a small island 109.3 km. (68.3 miles) from the south of Sicily and about 69.6 km. (43.5 miles) from Tunisia's northern coasts. On the history of Islamic Pantelleria refer to Ḥasan Ḥ. ʿAbd al-Wahhāb, "Qiṣṣat Jazīrat Qūṣara al-ʿArabiyya," *Al-Majalla al-Tārīkhiyya al-Miṣriyya* 2 (1949), 55–73; Amīn T. Ṭībī, "Jazīrat Qūṣara al-ʿArabiyya," *Majallat al-Buḥūth al-Tārīkhiyya* 3 (1981), 299–311.

[196] Al-Idrīsī describes it as a small island that lies parallel to Tunis and Carthage, very rich in wood and springs, which stimulate people to sail for it in winter to collect firewood and hewn lumber. See Idrīsī, *Nuzhat al-Mushtāq*, 2:583, 587, 601–602.

whether the owner of a boat can deliver her to a second party to make use of her or not.

He (Abū al-Qāsim) reports: I asked Muḥammad Ibn Ibrāhīm[197] about a group of merchants chartering a vessel from a man to transport such-and-such loads for such-and-such freight to such-and-such town. The wind drove them to a different location, whose governor imprisoned them and prevented them from departing. He said: Muḥammad told me: if the *sulṭān* does not prevent them [from sailing], the leasing contract remains firm and binding until the ship owner, willingly or unwillingly, carries them to their destination. I further asked him: [What] if the wind abates and dies down? Response: He shall have to wait a month or two while the wind subsides. However, if the wind abates and it is not anticipated to come for days, so that their waiting is prolonged, they shall annul the contract, and no freight charges are due to the ship owner, even if the merchants sold their goods and made a profit. I then asked him: What is the maximum extension of time for waiting in your opinion? Response: It is about a year or so [before the contract becomes nullify], but for a period of two months or slightly more, the contract remains mandatory. I further asked: [What] if the *sulṭān* impounds that particular vessel only? Response: The ship owner must hire a vessel, other than his [impounded one], to bring them to their intended destination, since the shipping contract took the form of guaranteed personal service. On the other hand, if they chartered the whole vessel and loaded her with whatever they wished (49) to carry, the arrangement falls into the category of leasing a specific vessel. But, if the leasing contract was based upon the delivery of cargo, the arrangement is then a guaranteed personal service. I said: What if the *sulṭān* prevented them [from sailing] too, or a favorable wind did not blow, or the waiting period lapsed, and the sailing season was closed, is he then entitled to collect the freight? Response: Initially, no freight is due to him because he did not reach the designated town. Therefore, he does not deserve the freight charges.[198] I said: [What] if they sold their commodities and greater proceeds accrued to them than they would have at the original destination?

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[197] Muḥammad Ibn Ibrāhīm Ibn al-Mundhir (d. 319/931). Ḥajjī, *Aʿlām al-Maghrib*, 1:238.

[198] Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:647; Wansharīsī, *Al-Miʿyār*, 8:299–300.

Response: Yes, even if they gained higher profits, they are absolved from paying the freight, because they did not sign the leasing contract requiring that they sail to this location.

This book was completed with God's blessing and assistance, and [our] prayer be upon our master Muḥammad and his kin and household, on the twenty-third of the blessed Rajab, of the year seven hundred and twenty-four [A.H.] [16 June, 1324].[199]

[Attachment: Six Jurisprudential Questions (Masā'il)]

[54*v*.] (50) A question: Abū ʿImrān al-Fāsī[200] was asked about a man concluding an invalid contract of lease, stipulating that the lessor is to be paid in foodstuffs: Should the contract between them be abrogated in Andalusia? Response: The ship owner is to collect a comparable shipping fee in cash. If he does not know the [value of] a comparable freight in cash, then he can learn about shipping rates in food at their designated place. If, for instance, the rate is equivalent to twenty percent [of the cargo's value], he has to find out how much the natives pay for that twenty percent [of such foodstuffs]. If it is said that their value is twenty *rubāʿī*s, then he learns that, for shipping 100 [units] of foodstuffs [local lessors] charge twenty *rubāʿī*s. The shipping fee is based on the shipping rate at the place from which the shipment originates.

A question: Abū ʿUmar Ibn al-Mukwī[201] was asked about a group shipping cargo on a vessel. Thereafter, a man brought his own load to be conveyed with theirs. The ship owner and merchants told him that the vessel was already full, and any additional freight would overload and jeopardize her. This happened in the winter. The cargo

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[199] The date of the manuscript is not necessarily that of the law it cites.

[200] Abū ʿImrān Mūsā Ibn ʿĪsā Ibn Abī al-Ḥājj al-Fāsī al-Qayrawānī (368–430/979–1039) is of the eighth generation, Ifrīqiyan branch, was born in Fez, then moved to Qayrawān, where he became the chief jurist until his death. Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 1:176–177; Makhlūf, *Shajarat al-Nūr*, 106; Zirkilī, *Al-Aʿlām*, 8:278; Ḥajjī, *Aʿlām al-Maghrib*, 1:299.

[201] Abū ʿUmar Aḥmad Ibn ʿAbd al-Malik known as Ibn al-Mukwī (324–401/936–1010) is a distinguished Andalusian jurist of the fourth generation. Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 1:176–177; Abū al-Qāsim Khalaf Ibn ʿAbd al-Malik Ibn Bashkuwāl, *Al-Ṣila* (Cairo, 1955), 1:28–29; Makhlūf, *Shajarat al-Nūr*, 102; Ḥajjī, *Aʿlām al-Maghrib*, 1:284.

owner said: "Transport me [and my cargo] aboard the vessel. If it arrives safely, I retain my property. However, if it is jettisoned, then I will not claim restitution from you." He loaded the shipment under these conditions and set sail. While *en route*, a violent gale compelled them to jettison his cargo. Thereafter he wanted to claim restitution from them for his jettisoned property. Is he eligible to do so or not? Response: Yes, he is entitled to bring a claim against them.[202]

A question from the book of Ibn Yūnus.[203] Ibn Yūnus reports: I was personally asked about a group loading their cargo on a vessel. After they departed, they were caught in a violent gale and feared sinking. They discovered that they had overloaded the ship and decided to unload a part of the cargo on the coast. The owners of goods argued about whose cargo should be unloaded. (51) I hold: If the shipper, who loaded his cargo first is known, he calls for the subsequent one to unload his own—so does the second with regard to the third, and so on, until the vessel reaches her actual capacity and the extra loads are discharged. If the loading order is unknown, then each shipper unloads a fixed proportion of his cargo. If they unload a tenth of the vessel's contents, every shipper unloads a tenth of his cargo, and if it is a fifth, then every one unloads a fifth. Some of our fellow jurists have ratified this ruling.[204]

A question that arises on ships, from the *ʿUtbiyya*, as relayed by hearsay from Abī Zayd: If a person hires [a ship] to transport cargo from Tripoli to Miṣr [Fusṭāṭ], but the carrier mistakenly conveys a different consignment to Miṣr [Fusṭāṭ], the shipper whose cargo was mistakenly shipped will be free to choose whether to collect a comparable value for his cargo based on its current value at the town from which the [carrier] shipped it, or get his designated cargo back.

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[202] Wansharīsī, *Al-Miʿyār*, 8:307; Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 8:33.

[203] The author of the treatise probably refers to Abū al-Qāsim Ibn Ziyād Ibn Yūnus al-Yaḥṣubī (d. 361/972).

[204] Burzulī, *Jāmiʿ Masāʾil al-Aḥkām*, 3:657–658; Wansharīsī, *Al-Miʿyār*, 8:307; Goitein, *Mediterranean Society*, 1:339–346. It seems as if the real freight rate was about ten to thirty percent [10–30%] of the cargo's value. Undoubtedly, when computing the shipping charges, the parties to the contract considered the distance between the embarkation and debarkation points, weight and volume of cargo, and size and capacity of a ship. For shipping rates in the Roman Empire of the second century C.E., see Sirks, *Food for Rome*, 64. A similar rate is fixed in Jewish rabbinical law, which entitles a lessor to collect between $^{1}/_{8}$ to $^{3}/_{16}$ of each conveyed *modius*. See Patai, "Ancient Jewish Seafaring and River-faring Laws," 394.

Ashhab added: The shipper owes no shipping fee at all. Nonetheless, Ibn al-Qāsim and Ibn Wahab hold that the lessee gets his designated shipment back but must pay the freight. They unanimously agree that [the shipper] cannot force him to bring it back, and that the carrier is barred from so, even if the shipper wishes. The former agreement remains valid, and the carrier has to turn back and convey the other cargo [from the port of origin to the agreed destination]. Ibn Ḥabīb transmitted a ruling from Aṣbagh, stating that the carrier has to bring the shipment back to Tripoli. Its owner, if he wishes, can require the carrier to bring the remaining load back, free of charge. Ibn Ḥabīb said: This is a good ruling. Abū Zayd ascribed to Ibn al-Qāsim a ruling saying: If a carrier shipped the cargo against the owner's will, the latter has the choice between holding him responsible for its value or receiving his cargo at the town to which it was shipped; [in either case, the lessee] owes no shipping charges at all.[205]

A question posed by Ibn al-Jallāb in the *Tafrīʿ*:[206] If a vessel is tied to another and then a wind blows, and one of the vessels is untied (released), because those aboard fear that she will sink, and she consequently sinks, then he who untied her will not be held responsible. If two vessels collide at their stems and one is wrecked, the other one is not held liable. [This case is] different from the collision of two horses.[207]

A question: Abū al-Faḍl Muḥammad Ibn Yaḥyā ruled concerning a vessel that was caught in rough seas and some of her shipment and tackle, such as ropes and anchors, were thrown overboard. (52) Response: Mercantile items that have been jettisoned should be deducted from the goods remaining on board, and the owners of

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[205] Ibn Abī Zayd Qayrawānī, *Al-Nawādir wal-Ziyādāt*, 7:108; Ibn Rushd, *Fatāwā*, 3:1541–1542; *idem*, *Masā'il*, 2:1121; *idem*, *Al-Bayān wal-Taḥṣīl*, 9:135–137; Qarāfī, *Al-Dhakhīra*, 5:491; Burzulī, *Jāmiʿ Masā'il al-Aḥkām*, 3:648–649.

[206] Abū al-Qāsim ʿUbayd Allāh Ibn al-Ḥusayn Ibn al-Ḥasan Ibn al-Jallāb al-Baṣrī (d. 378/988) is of the seventh generation, ʿIrāqī branch. Qāḍī ʿIyāḍ, *Tartīb al-Madārik*, 4:605; Shīrāzī, *Ṭabaqāt al-Fuqahā'*, 168; Ibn Farḥūn, *Al-Dībāj al-Mudhahhab*, 1:461; Zirkilī, *Al-Aʿlām*, 4:193.

[207] Ibn al-Jallāb, *al-Tafrīʿ*, 2:295–296; Shāfiʿī, *Al-Umm*, 6:86, 171, Saḥnūn, *Al-Mudawwana*, 4:492–493; 6:446; Ibn al-Mundhir al-Nīsabūrī, *Al-Ishrāf*, 2:182–184; Ibn Rushd, *Al-Bayān wal-Taḥṣīl*, 15:447–448; Ghazālī, *Al-Wajīz*, 2:152; Wansharīsī, *ʿUddat al-Burūq*, 629–630; Ibn Juzayy, *Al-Qawānīn al-Fiqhiyya*, 337; Jazīrī, *Al-Maqṣad al-Maḥmūd*, 232; Ibn Qudāma, *Al-Mughnī*, 12:548–550; Ibn al-Murtaḍā, *Al-Baḥr al-Zakhkhār*, 6:248.

the jetsam become joint owners [of the goods that remained safe]. As for the jettisoned tackle, the thrower is solely liable for it, and nobody else shares this responsibility. Muḥammad Ibn Abī Zamanīn[208] holds: the owner of the vessel is liable for all the equipment of the ship, such as the *qārib* (service or life boat), ropes, or cooking pots. This ruling is approved by some of our senior jurists, who excluded these items in their judicial rulings. However, the ship owner has no responsibility for the masts and the external parts of the vessel needed to propel her.[209] *Finis*.

[208] Abū ʿAbd Allāh Ibn ʿĪsā al-Miṣrī known as Ibn Abī Zamanīn (324–399/936–1008) is of Elvira. He lived for a while in Cordova, then returned to his native town, where he died and was buried. Makhlūf, *Shajarat al-Nūr*, 101; Zirkilī, *Al-Aʿlām*, 7:101; Ḥajjī, *Aʿlām al-Maghrib*, 1:283.

[209] Qāḍī ʿIyāḍ, *Madhāhib al-Ḥukkām*, 236.

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TS 8 J 29, f. 11
TS 10 J 4, f. 2
TS 10 J 5, f. 24
TS 10 J 6, f. 1
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TS 10 J 20, f. 17
TS 10 J 25, f. 1
TS 10 J 29, f. 5
TS 10 J 31, f. 8
TS 10 J 32, f. 10

TS 13 J 14, f. 2
TS 13 J 15, f. 9
TS 13, J 15, f. 20
TS 13 J 16, f. 19
TS 13 J 16, f. 23
TS 13 J 17, f. 2
TS 13 J 17, f. 3
TS 13 J 17, f. 7
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TS 13 J 20, f. 19
TS 13 J 23, f. 15
TS 13 J 23, f. 18
TS 13 J 25, f. 9
TS 13 J 26, f. 8
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TS 18 J 3, f. 13
TS 18 J 4, f. 6

Glasses (Fragments originally kept under glass, arranged according to size, and now in binders.)

TS 8.26
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TS NS 83.3
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TS NS 320.3
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TS NS J 300
TS NS J 303
TS NS J 563

ULC: University Library, Cambridge (Occasionally cited as CUL)

ULC Or 1080 J 13
ULC Or 1080 J 35
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ULC Or 1080 J 37
ULC Or 1080 J 79
ULC Or 1080 J 119
ULC Or 1080 J 166
ULC Or 1080 J 167
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A SHORT BIOGRAPHY OF EARLY MUSLIM JURISTS CITED IN THE KITĀB AKRIYAT AL-SUFUN

ʿAbd Allāh Ibn Nāfiʿ al-Sāʾigh al-Makhzūmī (d. 186/802), attended Mālik's sessions and succeeded Ibn Kināna as *muftī* in Medīna.

ʿAbd al-ʿAzīz Ibn Abī Ḥāzim Ibn Salama Ibn Dīnār, was of the first generation, died in Medīna after 182/798.

Abū ʿAbd Allāh ʿAbd al-Raḥmān Ibn Khālid Ibn Junāda Ibn al-Qāsim al-ʿUtqī al-Miṣrī (133–191/751–806) was an Egyptian born jurist and one of Mālik's disciples, who was well versed in *sufism* and the sciences.

Abū ʿAbd Allāh Aṣbagh Ibn al-Faraj Ibn Saʿīd Ibn Nāfiʿ al-Miṣrī (d. 225/840) was a disciple of Ibn al-Qāsim, Ibn Wahb, and Ashhab, and the first Egyptian generation Mālikī jurists. His grandfather Nāfiʿ ʿAtīq Ibn ʿAbd al-ʿAzīz Ibn Marwān Ibn al-Ḥakam was the governor of Egypt during the Umayyād caliphate.

Abū ʿAbd Allāh Ibn ʿĪsā al-Miṣrī known as Ibn Abī Zamanīn (324–399/936–1008) was born and died in Elvira.

Abū ʿAbd Allāh Muḥammad Ibn Ibrāhīm Ibn Ziyād Ibn al-Mawwāz (180–269/796–882), was a Mālikī jurist from Alexandria of the third generation (*ṭabaqa al-thālitha*), and the author of various books of which the most important is *Kītāb al-Mawwāziyya*, which is considered as important as Saḥnūn's *Mudawwana*.

Abū ʿAbd Allāh Muḥammad Ibn Yūsuf Ibn ʿUmar al-Kinānī al-Andalusī al-Iskandarānī died in Egypt on Thursday Shawwāl 3rd, 310 A.H., *i.e.*, 23rd of January 923 C.E., was a brother and disciple of the famous Mālikī jurist Yaḥyā Ibn ʿUmar, whose family came originally from al-Ḥāʾin (Jaén). He was a jurist of the third *ṭabaqa*, joined Ibn ʿAbdūs and other famous jurists while in Qayrawān. Biographers hold controversial views as to Ibn ʿUmar's death place, either Qayrawān, or Crete, or Egypt

Abū Bakr Aḥmad Ibn Muḥammad Ibn Muyassar al-Iskandarānī (d. 309/921) was an Egyptian jurist of the fourth generation.

Abū al-Ḥasan ʿAlī Ibn ʿAbd Allāh Ibn ʿAbd al-Raḥmān Ibn Abī Maṭar al-Muʿāfirī (d. 337/948) was an Alexandrian jurist and judge of the fourth generation—the Egyptian branch.

Abū ʿImrān Mūsā Ibn ʿĪsā Ibn Abī al-Ḥājj al-Fāsī al-Qayrawānī (368–430/979–1039) was of the eighth generation, Ifrīqiyan branch, was born in Fez, then moved to Qayrawān, where he became the chief jurist until his death.

Abū Marwān ʿAbd al-Malik Ibn ʿAbd al-ʿAzīz Ibn ʿAbd Allāh Ibn Abī Salama al-Mājishūn (d. 212/827) is of Persian origin and a disciple of Mālik.

Abū Marwān ʿAbd al-Malik Ibn Ḥabīb Ibn Sulaymān Ibn Ḥārūn al-Salamī al-Elvīrī al-Qurṭubī (174–238/790–853) was of the third generation and the author of *al-Wāḍiḥa*.

Abū Marwān ʿAbd al-Malik Ibn Sulaymān Ibn Hārūn Ibn ʿAbbās Ibn Murdās Ibn Ḥabīb al-Salamī al-Qurṭubī (174–238/790–853), a most learned Andalusian jurist, was born in Elvira and settled in Cordova.

Abū Muḥammad ʿAbd Allāh Ibn Wahab Ibn Muslim al-Qurashī (125–197/743–813).

Abū al-Qāsim Ibn Ziyād Ibn Yūnus al-Yaḥṣubī (d. 361/972).

Abū al-Qāsim ʿUbayd Allāh Ibn al-Ḥusayn Ibn al-Ḥasan Ibn al-Jallāb al-Baṣrī (d. 378/988) was of the seventh generation, ʿIrāqī branch.

Abū Saʿīd ʿAbd al-Salām Ibn Saʿīd Ibn Ḥabīb al-Tanūkhī, known as Saḥnūn (160–240/777–854), was a judge and a Mālikī jurist of the first generation (*ṭabaqa*

al-ūlā), but did not see or meet *Imām* Mālik. He studied with Ibn al-Qāsim, Ibn Wahb and Ashhab and became the outstanding scholar of the Maghrib. His family immigrated from Ḥomṣ, Syria, to Qayrawān, Tunisia, where he was a *qāḍī* from 234/848 until his death in 240/854. *Kītāb al-Mudawwana*, attributed to Ibn al-Qāsim, is regarded as one of the outstanding jurisprudential sources used by the people of Qayrawān.

Abū Saʿīd Khalaf Ibn ʿUmar, also called ʿUthmān Ibn ʿUmar, and by others ʿUthmān Ibn Khalaf known as Ibn Akhī Hishām al-Khayyāṭ (299–371/911–981) was a Qayrawānī scholar of the sixth generation of Malikī jurists in Ifrīqiya.

Abū ʿUmar Aḥmad Ibn ʿAbd al-Malik known as Ibn al-Mukwī (324–401/936–1010) was a distinguished Andalusian jurist of the fourth generation.

Abū Zakariyyā Yaḥyā Ibn ʿUmar Ibn Yūsuf al-Kinānī al-Andalusī (213–289/828–902) was a Cordovan jurist and the author of many jurisprudential works. He traveled in Muslim countries in the East, arrived in Qayrawān, and spent his last years in the coastal *ribāṭ* of Sūsa, where he joined Saḥnūn.

Abū Zayd ʿAbd Allāh Ibn ʿAbd al-Raḥmān al-Qayrawānī (310–386/922–996) was the author of *Al-Nawādir wal-Ziyādāt*.

Asad Ibn al-Furāt (141–213/9–828) was an important jurist and theologian in Ifrīqiya, who began the Muslim conquest of Sicily. His family, originally from Harran in Mesopotamia, emigrated with him to Ifrīqiya. He studied in Medīna with Mālik Ibn Anas, the founder of the Mālikī Law School, and in Kūfa with a disciple of Abū Ḥanīfa, the founder of the Hanafite tradition. He collected his views on religious law in the *Asadiyya*, which had great influence in Ifrīqiya. After his return to Ifriqiya he became a judge in Qayrawān, where he soon came into conflict with the Aghlabīd Emir Ziyādat Allāh I (7–838) after criticising his luxurious and impious lifestyle. In order to get rid of this unwelcome critic, Ziyādat Allāh appointed Ibn al-Furāt the leader of an expedition to Byzantine Sicily. In 212/827 he landed with a force of Arabs in Sicily and following a defeat of Byzantine troops proceeded to attack Syracuse. However, the city could not be taken and Asad soon died of plague.

Ashhab Ibn ʿAbd al-ʿAzīz Ibn Dāwūd Ibn Ibrāhīm al-Qaysī (145–204/762–819) was a companion of Mālik and a highly learned Egyptian scholar.

Faḍl Ibn Salama Ibn Jarīr Ibn Mankhūl al-Juhanī al-Bajjānī (d. 319/931).

Ḥabīb Ibn Naṣr Ibn Sahl al-Tamīmī (201–287/816–900) was an Ifrīqiyan jurist of the third generation and one of Saḥnūn's companions.

Ibn Abū Zayd, ʿAbd al-Raḥmān Ibn ʿUmar Ibn Abī al-Ghamr (d. 234/848).

Khalaf Ibn Abī Firās was a Mālikī jurist from Qayrawān with a bad reputation, who flourished between the years 330–359/941–969 and died there in 359/969, who compiled the *Kītāb Akriyat al-Sufun* and added his own preface besides a few legal inquiries ascribed to Abū Muḥammad Ibn Abī Zayd, Abī Saʿīd Ibn Akhī Hishām, and ʿAbd al-Malik Ibn Isḥāq Ibn al-Tabbān. An anonymous scribe or notary copied the current form of the *Kītāb Akriyat al-Sufun* on the 23rd of Rajab, 724 A.H (16th June, 1324 C.E.).

Mālik Ibn Anas (97–179/715–795) was the founder of the Mālikī *madhhab*, a *Sunnī* legal school, which spread westwards from its first centers, Medīna and Egypt, over almost all of Muslim North, Central and West Africa, and the Mediterranean Islands. It was also predominant in Muslim Spain.

Muḥammad Ibn al-Ḥakam was the fourth son of Ibn ʿAbd Allāh Ibn ʿAmīd al-Ḥakam and a member of ʿAbd al-Ḥakam dynasty, died in 268/881.

Muḥammad Ibn Ibrāhīm Ibn ʿAbd Allāh Ibn ʿAbdūs Ibn Bashīr (202–260/817–874) was a jurist, a mystic (*ṣūfī*), and an outstanding follower of the third generation of Mālikī jurists in Ifrīqiya.

Muḥammad Ibn Ibrāhīm Ibn al-Mundhir (d. 319/931).

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